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A
SELECTION OF CASES
ON THE
LAW OF CONTRACTS

EDITED AND ANNOTATED
BY
SAMUEL WILLISTON
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IN TWO VOLUMES
VOL. II.

BOSTON
LITTLE, BROWN, AND COMPANY
1904

TRANSMITTED BY MAIL

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CASES ON CONTRACTS.

CHAPTER V. — *continued.*

SECTION II.

IMPLIED CONDITIONS AND EFFECT OF THE PLAINTIFF'S FAILURE TO PERFORM HIS PROMISE.¹

ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1500.

[*Reported in Year Book, 15 Henry 7, folio 10 b, placitum 7.*]

NOTA PER FINEUX, C. J. If one covenant with me to serve me for a year, and I covenant with him to give him 20*l.*, if I do not say for said cause, he shall have an action for the 20*l.* although he never serves me; otherwise, if I say he shall have 20*l.* for said cause. So if I covenant with a man that I will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him, to compel him to make this estate; but if the covenant be that he will make the estate to us two for said cause, then he shall not make the estate until we are married. And such was the opinion of the Court. And REDR, J., said it was so without doubt.

BROCAS' CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1588.

[*Reported in 3 Leonard, 219.*]

BROCAS, lord of a manor, covenanted with his copyholder to assure to him and his heirs the freehold and inheritance of his copyhold. And the said copyholder, in consideration of the same performed, covenanted to pay such a sum. It was the opinion of the whole Court, that the said copyholder is not tied to pay the said sum before the

¹ The treatment of this subject in the Civil Law is considered in 13 Harv. L. Rev. 80.
VOL. II. — 1

assurance made and the covenant performed. But if the words had been, *in consideration of the said covenant to be performed*, then he is bounden to pay the money presently, and to have his remedy over by covenant.

NICHOLS v. RAYNBRED.

HILARY TERM, 1615.

[Reported in *Hobart*, 88.]

NICHOLS brought an assumpsit against Raynbred, declaring that, in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise.¹ Note, here the promises must be at one instant, for else they will be both *nuda pacta*.

fi - lateral just beginning to be performed.

PORDAGE v. COLE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1609.

[Reported in 1 *Williams' Saunders*, 319.]

DEBT upon a specialty for 774*l.* 15*s.* The plaintiff declares that the defendant by his certain writing of agreement made at, &c., by the plaintiff by the name, &c., and the defendant by the name, &c., and brings the deed into court, &c., it was agreed between the plaintiff and defendant in manner and form following, viz., That the defendant should give to the plaintiff the sum of 775*l.* for all his lands, with a house called Ashmole-house thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5*s.* as an earnest, and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of 775*l.*, a week after the feast of St. John the Baptist then next following (all other movables, with the corn upon the ground, except). And although

¹ *Gower v. Capper*, Croke El. 543; *Bettisworth v. Campion*, Yelv. 134; *Spanish Ambassador v. Gifford*, 1 Rolle, 336; *Thorpe's Case*, March, 75; *Ware v. Chappel*, Style, 186; *Gibbons v. Prewde*, Hardres, 102; *Beany v. Turner*, 1 Lev. 293; *Cole v. Shallett*, 3 Lev. 41; *Blackwell v. Nash*, 1 Strange, 535; *Martindale v. Fisher*, 1 Wils. 88, *acc.*

the defendant has paid five shillings, parcel, &c., yet the said defendant, although often requested, has not paid the residue, to the damage, &c.. The defendant prays oyer of the specialty, which is entered in hoc verba, to wit.: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, esquire, that the said Bassett Cole shall give unto the said doctor 775*l.* for all his lands, with Ashmole-house thereunto belonging, with the brewing vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5*s.*; the money to be paid before Midsummer, 1668; all other movables, with the corn upon the ground, excepted." And upon oyer thereof the defendant demurs. And *Within*s, of counsel with the defendant, took several exceptions to the declaration. 1. That the demand by the declaration is of 774*l.* 15*s.*; whereas the whole sum is 775*l.*; and the 5*s.* paid for earnest shall not be taken as part of the sum of 775*l.* *Sed non allocatur*; for, *per Curiam*, it shall be intended as part of the sum. 2. That the exception of the residue of the movables is not well recited, for the word (except) in the declaration is not good for want of sense. *Sed non allocatur*, for it is sensible enough in the declaration; and if it were not, the declaration is good; for an insensible clause does not make the rest of the deed vicious which is sensible in itself. 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money. (And it was argued by *Within*s, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part; Trin. 12 Jac. I. between Holder v. Tayloe,¹ Ughtred's case,² and Sir Richard Pool's case there cited, and Gray's case,³ and that the word (*pro*) made a condition in things executory.⁴ And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said

¹ 1 Roll. Abr. 518 (C.), pl. 2, 3.

² 5 Rep. 78, 79; s. c. Cro. Eliz. 405.

³ 7 Rep. 10.

Co. Lit. 204a.

pleading
make more
definite content

that both parties had sealed it; and therefore judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.¹

PEETERS v. OPIE.

IN THE KING'S BENCH, TRINITY TERM, 1671.

[Reported in 2 Williams' Saunders, 350.]

ASSUMPSIT. The plaintiff declares that it was agreed between the plaintiff and defendant, that the plaintiff should pull down and prostrate the walls of three houses, and in the places in which the said walls were erected should build for the said defendant a malt-house, and a linny or dry-house, and cover them with slate or tile, and that the said defendant should pay to the said plaintiff, for his work in and about the pulling down and prostrating the said walls, and building and erecting the said malt-house and linny-house, 8*l.* of lawful money, &c. (And then the plaintiff lays mutual promises, namely, that in consideration that the plaintiff had undertaken to perform his part of the said agreement, the

¹ In a note to this case, Mr. Serjeant Williams states the following rules for distinguishing between dependent and independent covenants: 1. If a day be appointed for payment of money or part of it or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. 2. But when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale.

In *Mattock v. Kinglake*, 10 Ad. & E. 50, Patteson, J., said: "*Pordage v. Cole* is directly in point. We must overrule it if we decide in favor of the defendant," and since a time was fixed for payment and none for conveyance, the court allowed the plaintiff to recover the price without conveying or offering to convey. See also *Sibthorp v. Brunel*, 3 Ex. 826; *Dicker v. Jackson*, 6 C. B. 676; *Gibson v. Newman*, 2 Miss. 341. Compare, however, *Wilks v. Smith*, 10 M. & W. 355; *Marsden v. Moore*, 4 H. & N. 500.

defendant promised to perform the said agreement on his part to be performed; and the plaintiff also lays another promise in his declaration, and then he makes this averment, namely, "And the said plaintiff in fact says that he always from the time of making the said agreement hitherto was ready and offered to perform the said agreement in all things on his part to be performed, yet the said defendant" has not paid the 8*l.* nor the other sums of money contained in the other promise, to the plaintiff's damage of 20*l.* The defendant pleads *non assumpsit*, and the issue was found for the plaintiff on both promises, and entire damages assessed.

And now in this Term *Saunders* moved in arrest of judgment that the plaintiff has not well entitled himself to the action on the said promise for want of averring that he has performed the work which he was to do, or that he was prevented from doing it by the defendant; for he only says that he was ready and offered, but he does not say that he performed, or that he was hindered or prevented by the plaintiff from doing it. And therefore he ought not to have the 8*l.*, for he was to have it for his labor, &c.; which implies that he first ought to do the work before he can demand his wages for his labor. For though it be laid by way of agreement and mutual promise, yet it appears by the very agreement itself that the plaintiff was to do the work and to have the 8*l.* for his work; and therefore the mutual promise is only to perform the agreement, which the defendant has not broken on his part by the non-payment of the said 8*l.*, if the plaintiff has not performed the work, which was to be precedent to the payment of the money. And although the plaintiff has laid it by way of mutual agreement, yet in fact it is no more than that the defendant desired the plaintiff to do the work, and he would pay him 8*l.* for it, which is a common contract between parties; and the meaning of it is that the work should be done first before payment; for the party who is to pay the money does not intend to pay it unless the work be performed; he does not mean to pay his money, and then to bring an action for not performing the work against one who perhaps is not responsible, or, after he has got the money, will run away; but if the plaintiff has offered to do the work and the defendant has hindered him, the defendant will be in such case bound to pay the money, because he ought not to take advantage of his own wrong. And therefore the judgment was stayed until it should be moved on the other side.

And afterwards at another day, *Pollexfen* moved for judgment for the plaintiff, because, as he said, there was here a promise on each side, and if the plaintiff has not performed the agreement on his part, the defendant has remedy against him by action; and here the agreement is not that the money is to be paid after the work is done, but it is to be paid generally whether the work be done or not; but if the work is not done the defendant has his remedy on the promise as aforesaid; and therefore he prayed judgment for the plaintiff.

And TWYSDEN, J., was of opinion that the plaintiff should have judgment for the reason given by Pollexfen; and also because the words 'for his labor' are no more than what the law would have implied. And he said that if the agreement had been that the plaintiff should do the work and the defendant should pay the plaintiff 8*l.*, without saying for his work, there had been no doubt that the plaintiff might maintain an action for the money although he had not done the work: yet the law implies that the 8*l.* was to be paid for his work, and therefore the addition of the words 'for his work' will not alter the case at all, for they would be intended if they had been omitted, *et expressio eorum quæ tacitè insunt nihil operatur*; wherefore he concluded that the plaintiff ought to have his judgment.

HALE, C. J., contra; and that the declaration was insufficient, and judgment should be arrested; ~~for he said that the words 'for his labor'~~ make a condition precedent, so that the plaintiff ought of necessity to have the work done, or at least that he was hindered from doing it by the defendant, before he can demand the money. And he further said that if the said agreement had been put into writing under the seals of the parties, it had been clear that the plaintiff could not maintain an action of covenant for the 8*l.* without such an averment; and no more can he do so here; and although there were mutual promises in the case, yet the defendant's promise was on the performance of the agreement, which in itself was only conditional on the defendant's part, namely, that if the plaintiff performed the work, then the defendant was to pay him 8*l.* for his labor, but otherwise not; and here it appears that the plaintiff has not performed the work; wherefore the defendant is not bound to pay him the 8*l.* notwithstanding the mutual promise. But he said, that if by the agreement it had been that the 8*l.* should be paid on any certain day, perhaps the law would be otherwise; because then it might be construed that the defendant relied on the plaintiff's mutual promise for his security; but here no certain time being limited when the money should be paid, the law makes a construction that it shall be paid when the work will be finished and not before, unless the defendant himself was the cause why it was not finished, which does not appear here in this record.

RAINFORD, J., agreed with HALE, MORTON, J., being absent on account of ill health; wherefore the judgment was not absolutely arrested. but the plaintiff had leave to move it again; but his counsel perceiving the opinion of HALE and RAINSFORD, did not move it again, and consequently judgment was arrested. *Vide* Co. Lit. 204 a, that the word *pro* makes a condition in things executory, &c.

Afterwards, in Trinity Term, in the twenty-fourth year of the now king, it was moved again; and TWYSDEN retaining his former opinion, the Court gave judgment for the plaintiff, because then HALE, C. J., and the other judges held, that "he was ready and offered to perform, &c., was a sufficient averment after verdict.

Quod nota.

THORPE v. THORPE.

IN THE KING'S BENCH, EASTER TERM, 1701.

[Reported in 12 Modern, 455.]

ERROR from the Court of Common Pleas of a judgment in an action on the case, wherein the plaintiff declared, that the defendant had, and held of him by way of mortgage two closes of copyhold lands; and that there was a discourse between them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage; upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him seven pounds above all that was due; and that, in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side; and avers that he did perform all on his, the plaintiff's, side, but that the defendant paid one pound seven shillings of the said seven pounds, and no more, &c.

To this the defendant pleads in bar, that long after the promise, viz., 29th July, 1694, the plaintiff did, by indenture made between him and the defendant, release to the defendant "all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsoever, which ever he had, or he, his heirs, executors, or assigns ever should have, for or by reason of any thing, matter, or demand whatsoever."

Upon *oyer* of this deed of release, it recited the said mortgage, and released "all provisos therein, and all his estate, right, title, and interest in the said close, both in law and equity;" and then follows the foregoing clause.

And upon this the plaintiff demurred, and judgment for the plaintiff in the Court of Common Pleas.

Cowper, for the plaintiff in error, objected to the declaration, that the consideration set forth in it was not sufficient to support a promise; for, though equity of redemption be a thing pretty well known, and for the most part valuable, yet some may be not of any value, and this may be of them; and therefore it was necessary to show that it was of some value; and for an example of an equity of redemption without value, he put this case: If a mortgage be till so much money be raised by the mortgagee out of the profits; here the mortgagor has an equity of redeeming by payment of the money and charges, and yet it is of no value to the other to have it released; but to the contrary, the redemption there would be rather a benefit to him.

Secondly, he objected that it did not appear by the count that the

mortgage was forfeited, and then the plaintiff had no equity of redemption. *Ergo*, no consideration for the promise; *ergo*, &c. *Vide* 2 Saund. 136; Style, 248.

Then the plea in bar is good, for the release is full in words, and subsequent to the promise. But, say they, the money was to be paid in consideration of the release; therefore the release, which created the duty, cannot *in eodem instanti* extinguish it. To this I answer, that the payment of the money does not arise from the release, but from the promise; and the promise, and not the release, being the consideration of the debt, action lies upon the mutual promises before the release. *Ergo*, the release comes after the cause of action, and consequently destroys it. March, 75. Where promises are their own mutual considerations, there needs no performance to support the action. Hob. 88. In consideration that the plaintiff promised to deliver the defendant a cow, the defendant promised the plaintiff fifty shillings; in an action for the money there needs no averment of delivery of the cow, or *vice versa*. Cro. El. 543. A declaration, that in consideration A. was indebted to B. by bills, and that he promised to deliver him up the bills, he promised to give him good security by bond for the money, and avers the delivery of the bills; the defendant traverses the delivery, and on demurrer adjudged against him, because not material; and it was not the consideration of the *assumpsit*, but the promise to deliver was it. Cro. El. 708, *simile*.

But Cro. El. 889, the promise is, *super solutionem* of such a sum, to do, &c.; therefore the thing not demandable before payment. So is Cro. Car. 19. So that if here the cause of action did arise upon the promise before any release made, the release subsequent clearly discharges it, *secus* not, if there were no more in the case. And if the release be what gives them cause of action, then they should show a release made, or a tender of it; and not generally, as here, that they have performed all of their side.

But it is objected that, although an action had accrued to the plaintiff immediately upon the promise, yet this release should not discharge it; for that the release shall be taken according to the intent of the parties, which was only to discharge the equity of redemption; and the general words of it shall be restrained and qualified by the foregoing special words. But I answer, that after releasing the equity of redemption by express words, there are in the self-same clause general words of "all actions and demands;" which I agree are qualified by the special words and intent of the parties. And then comes the clause in question, distinctly and separately from the first, releasing "all actions and demands;" and this clause would be entirely useless if they be applied to the first, because the first has a general clause in itself to serve it as a wall or *muniment*, and so stands in no need of any more. 2 Roll. Ab. 409. The general words, that are restrained by the special words, are part of the same clause and sentence, and not, as here, distinct and separate. 3 Mod. 277. Suppose A. recited in a deed, that whereas B. owes him ten

pounds, and releases thereby "the said ten pounds, and all actions and demands," and further proceeds and releases him "all debts, duties, actions, and demands," would this last clause be rather entirely rejected than extended to any thing but the ten pounds? And upon this diversity Hetley, 9 and 15, Aubry's Case, is distinguishable from the present case.]

Cheshire, contra.

HOLT, C. J. [A release of an equity of redemption is a good consideration for a promise; and we can take notice of an equity of redemption, and that it is a valuable thing.] But suppose it were not a thing valuable, and the case were this. A. is possessed of Black Acre, to which B. has no manner of right, and A. desires B. release him all his right to Black Acre, and promises him, in consideration thereof, to pay so much money, surely this is a good consideration and a good promise, for it puts B. to the trouble of making a release. [Then where the doing a thing will be a good consideration, a promise to do that thing will be so too, and though the want of an averment that a release was made would have been bad if demurred to, yet it is now helped by going over and pleading. (If one covenant to do several things in a certain deed agreed on, and in the end bind himself in a penalty for so doing, and debt is brought for the penalty, and shows generally that he has done nothing of what is agreed on, this would be bad on demurrer, but a plea over cures it, so if one covenant that, if J. S. do such and such things, that he will pay him so much money, J. S. brings action, and says, generally, that he performed all the things, this would be bad on demurrer, but curable by pleading over. Indeed, this being a general distinct clause seems to diversify this case from all the cases before put, where the general words, restrained by the precedent particular ones, are in the same clause with the particulars.)]

At another day this Term, after great consideration, the whole Court came to one resolution, which was thus delivered:—

HOLT, C. J. We all agree that the promise was not discharged by this release. It was urged at the bar by Mr. Cowper that if the plaintiff might have founded an action upon the mutual promise and agreement before any performance on his part, that certainly this release would have barred him; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no color for the release to bar him; for till he makes the release in this case, if he has no title to the seven pounds, then till release there is no right of action; and then they do not lie in demand till release; and that a release of "all demands" will not release a thing that does not lie in demand at that time, vide 2 Cro. 171; 5 Co. 70, Hoe's Case. A release to bail in the King's Bench, before judgment against the principal, is not good, because till then the cause of action is uncertain, and therefore not demandable.

So the whole question will be here, [Whether the plaintiff could have an action before the release?] And as to that it has been urged, that in this case there were mutual promises, and the one promise is the consideration of the other, and that then he that brings the action needs not aver any performance of his side; and this likewise would be a true and necessary consequence, if the premises were true. [But where the one promise is the consideration of the other, and where the performance, and not the promise, is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon; for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay seven pounds, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him seven pounds; so that the release is the consideration, and therefore being executory is a condition precedent, which must be averred.] And whereas there seems to be a variance in the books upon this learning, it will be fit on this occasion to settle it; and I agree the case in Hob. 88 to be good law, for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies for either side without performance of his promise; but if by the agreement A. were to deliver B. a cow, and for it B. were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action; and upon this diversity the books are reconcilable. 15 Hen. 7, 10, pl. 17. If A. covenant with B. to serve him for a year, and B. covenant with A. to pay him ten pounds, there A. shall maintain an action for the ten pounds before any service; but if B. had covenanted to pay ten pounds for the said service, there A. could not maintain an action for the money before the service performed. [And there is great reason for this diversity; for when one promises, agrees, or covenants, to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done; and the word "for" is a condition precedent in such cases. But upon this head some diversities are to be observed.]

First. If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incure before the time the thing for which the promise, agreement, or covenant, is made, is to be performed by the tenor of the agreement; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies, on which, by the

in the first instance, the day is set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incure before the time the thing for which the promise, agreement, or covenant, is made, is to be performed by the tenor of the agreement; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies, on which, by the

express words of the agreement, they have depended. *Vide* 48 Edw. 3, 2, 3, cited in Ughtred's Case,¹ where the diversity is taken when there are mutual remedies and not; it is thus put in that book: Sir Richard Pool covenants with Sir Ralph Tolcelser, to serve him with three esquires in the wars of France. Sir Ralph Tolcelser covenants, in consideration of those services, to pay him so much money; and there, it is said, action will lie for the money without any services performed.) But if you look into the book at large, you will find it was upon the diversity which I have taken; for the case in 48 Edw. 3, 2, 3, is, Richard Pool covenants with Ralph Tolcelser to serve him with three esquires in the wars of France, and Ralph Tolcelser covenanted with him to pay him so much money for the service; and it was further agreed that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by Sir Richard Pool it was objected, that the service was not performed; but there was no room for that objection upon the diversity which I have taken, the money by the agreement being made payable at a day certain before the service was to have been performed. 1 Vent. 147. Covenant, that in case A. would let B. enjoy land for a certain term of years, for the enjoyment he would pay him so much money before the expiration of the years. 3 Leo. 156. Covenant to pay so much money, the other making him a good estate in such lands; held the making the estate to be a condition precedent, and therefore to be averred. 1 Saund. 319 is upon the same diversity: An agreement was to let a house to the plaintiff, with certain brewing vessels: the plaintiff covenants to pay so much money for it before Midsummer-day; and here, because a day certain was appointed for the payment, though no assurance was made of the house, &c., yet an action lay for the money. If A. covenant to make an assurance of lands to B., who covenants to pay him ten pounds in consideration thereof, there he is not bound to pay the money before the assurance made; but if he had covenanted to pay the money in consideration of the covenant to make the assurance, he would be liable to an action immediately.

Secondly. If there be a day for the payment of the money, or doing of other act for another, and that day is to be after the performance of the thing for which the promise, &c., was made, there, if the agreement be to pay the money, or do other thing, "for," or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action; and for this Sir W. Jones, 218. The executor of A. brought an action on the case against B., declaring, that in consideration A. in his life-time did promise to assure certain lands to B. before Michaelmas next, B. promised to pay him so much money for the land; so the assurance was to be made before Michaelmas, and the money was to be paid for

¹ 7 Co. 104.

the land, and consequently after Michaelmas, for A. had time till Michaelmas to make the assurance; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. This case, as it is there reported, is intricate, and requires consideration to make this construction upon it; but upon examination it is a full authority in point. Dy. 76, pl. 30. A. agrees to deliver B. a hawk at Midsummer, for which he agrees to pay him a horse at Michaelmas; there, if a hawk be not delivered at Midsummer, there shall be no horse delivered at Michaelmas, nor any remedy for it. Ughtred's case has afforded a ground for a variety of opinions upon this question; but such as seem against these diversities laid down by me shall receive a full answer. And in 1 Roll. Abr. 414, are several cases which have been urged against me; the first is said to have been in Michaelmas Term, in the seventh year of James the First, and it was a charter-party between A. and B., by which A. covenants to go a voyage, and take in several loadings at several ports beyond the seas, and return with them home; B. covenants to pay A. for all that voyage 147*l.* at a day, whether after or before the voyage is left in doubt by the book; and there it was adjudged, there might have an action lain for the money without averment of performance of the voyage; and this seems an authority in point against me. But first, it does not appear there, but that the day of payment was before the voyage performed; but a full answer to it is, that there was a writ of error brought, and that judgment reversed for want of an averment. *Vide* 1 Bulst. 167. Rolle reports the judgment in the Common Pleas, in the seventh year of James the First; but it seems had not seen the reversal thereof, which was in the ninth year of James the First, two years after, as it is in Bulstrode, where it is adjudged, that *pro totâ transfretatione* is a condition precedent, and that its being in mutual covenants makes no alteration. Then there is 1 Roll. Abr. 415, said to be in Michaelmas Term, in the fifteenth year of Charles the First; and it seems also against me in point: There were articles of agreement made by A. in behalf of B. of the one part, and C. of the other part, where it was covenanted by A., that B. for consideration hereafter expressed should convey certain lands to C.; C. on his part, for the consideration aforesaid, covenanted to pay B. 166*l.*; and it was adjudged, that the assuring the land was not a condition precedent. But this case does not come up to ours; for there is an express covenant, that (for consideration hereafter expressed) B. would convey to C., and C. (upon consideration aforesaid) covenants to pay the money; and that must be forasmuch as A. hath covenanted that B. should assure lands for consideration hereafter mentioned, that is, that B. hath covenanted to pay so much money; for it is *pro consideratione prædictâ*; and the question is, What is meant by the words *pro consideratione præd.*? It is not said, "for consideration of conveyance of the land," but *pro consideratione præd.*, which must be

understood in consideration of the agreement that B. should convey, &c. ; for the one covenants for consideration hereafter mentioned, which must be the covenant for payment of the money, and the other covenants for consideration aforesaid, which must be that A. covenanted that B. should convey. But I must needs say, there is another home case ; it was also in the time of King Charles the First, and it was on mutual promises to stand to an award between A. and B., and laid in consideration A. on his part did promise to stand to the award, B. on his part did promise to stand to it ; and the award was made, that A. should pay B. 10*l.*, in consideration whereof B. should enter into an obligation to release unto A. all actions ; A. brings an action against B. for not entering into the obligation according to the award ; and he did aver, that he had done all on his part, but that B. had not entered into the obligation ; and the exception was taken, that there was no averment of the payment of the 10*l.*, in consideration whereof he was to have entered into the bond ; but it was said, there needed no averment, and this is full against me. But Rolle himself there says, the Court were divided. And 1 Cro. 384, gives a quite contrary report of the case, and says : Jones and Berkely held it a condition precedent against Croke ; so I rather believe Croke, who was one of the judges, and tells you himself was of a contrary opinion. And as to Haye's case, which is also in 1 Roll. Abr. *ubi supra*, it is reported, 1 Cro. 433, and it has no such point in it. These authorities, therefore, are well answered. There are some other scattered authorities in the books of this kind.

But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance ? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A. shall have the horse of B., and A. agree that B. shall have his money, they may make it so ; and then there needs no averment of performance to maintain an action on either side. But if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed before his doing what he undertakes of his side, it must be then averred ; as, where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse. And it would be very dangerous to make every cursory agreement of parties to amount to mutual promises to bear an action without averment of performance ; and, therefore, if two meet, and the one has a horse to sell, and the other would buy one, and they agree on the price, and then part without any earnest, or reducing the matter solemnly into writing, there, though there be no words of condition precedent, such cursory agreement ought not to be admitted as evidence of a mutual agreement ; and it ought not to pass for a contract, but rather for a bare communication. *Vide Dy. 30 ; Style, 32.* But if there be a solemn transaction, as writing, as that A. would deliver his horse to B., and no

time appointed, and that B. should pay so much money to A., there, if there be not the word "for," or other words of condition precedent, a mutual action will lie, without averment of performance; but if it be only a discourse, without the solemnity of writing, earnest, &c., it ought not to be allowed. There is a case in 2 Mod. 88. In assumpsit the plaintiff declared, that in consideration that he promised to assign to the defendant his interest in certain land, the defendant promised to pay him proinde so much money, and averred that he offered to assign the interest; but that matter being not well pleaded, the question was, whether it was necessary to aver performance; and held, on the reason of Ughtred's case, that it was not. And this will be a light to the reasons of North v. Wild [Ware v. Chappell?] there. *Vide* Style, 186. Covenants were between A. and B., that A. should bring 500 soldiers to such a place, by a day certain, to be transported; and that B. should attend there then with ships to transport them, and both parties failed; and the question was, Whether, though A. had brought no soldiers, B. had broke his covenant, in not being ready with ships? And held, that B. had broke his covenant, though A. had not brought the soldiers. But this differs from our case; for there are two distinct acts to be done, one is to be ready with the soldiers, and the other with ships; and the performance of the one does not depend upon the other; the doing of the one is not the reward for the doing of the other; but they are distinct acts, and each party to do his part; there was also a day appointed. And this is not a hard case, for they are mutual acts not depending the one on the other. But in our case the money was to be paid for the release, and a vast difference. And the 7l. being to be paid in consideration of making the release, the words "in consideration" make a condition precedent, which, till performed, does not entitle the plaintiff to action. Then the 7l. were not demandable here, and consequently not dischargeable by the general release of all demands.

Another objection was, that the plaintiff had not averred a release given, or tendered by him, as he ought to have done. But here sufficient appears that it was done; for he avers performance of all that was to be done on his side; and that general averment, though informal, and besides wants time and place, for which it had been bad on demurrer, is helped by the defendant's passing it over and pleading a release, whereby he admits the plaintiff had a cause of action. And there are stronger cases than this in the books, where pleading over has helped an insufficient declaration. 3 H. 6, 8. Debt upon indentures, in which there was a penalty in which the defendant did bind himself, if he did not perform all the covenants in the said indentures; and regularly in such cases the way is, for the plaintiff to set forth the indentures, and to assign breach of one of the covenants in certain; and in debt for the penalty he said generally that the defendant had broke all the covenants in that indenture, without showing any one in certain; the defendant pleaded a collateral matter in bar, and adjudged

the declaration had been bad on demurrer, but that the plea over cured it, though the breach was double and uncertain. 9 H. 6, 16, 19. And it was so adjudged in this court, in *Bernard v. Michel*.¹ But a full authority is that of *Vivian v. Shipping*:² though they agreed the money awarded was to be paid before the other was to enter into the obligation to the plaintiff, yet the plaintiff did not expressly aver payment, but generally, as here, that he had performed all on his side; and that was adjudged good after plea pleaded. / So we all agree the judgment ought to be affirmed; for there was no money due to the plaintiff till release of the equity of redemption, and therefore none demandable till then, and consequently a release of all demands could not bar it.

NOTE. In this case Cowper offered this diversity in relation to mutual promises, that where the promise is of a valuable thing to the defendant, there such promise, without any performance, may be a good consideration; but where the promise is not of a thing valuable, but may be a consideration because a trouble to the party promising, there such promise, without a performance, cannot be a consideration, because such promise cannot be a trouble.

But *per* HOLT, C. J. No diversity at all; but the cases are the same upon the learning laid down above.

CALLONEL v. BRIGGS.

AT NISI PRIUS, CORAM HOLT, C. J., TRINITY TERM, 1708.

[Reported in 1 *Salkeld*, 112.]

AN agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, &c. *Et per* HOLT, C. J. If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; for transferring in the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance. 1 Saund. 319. If I sell you my horse for 10*l.*, if you will have the horse I must have the money; or if I will have the money you must have the horse; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months.

¹ 1 Vent. 114, 126, 2 Keb. 754, 766.

² Cro. Car. 384.

LOCK v. WRIGHT.

IN THE KING'S BENCH, TRINITY TERM, 1723.

[Reported in 1 Strange, 569.]

THE plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he (the defendant) would accept of the plaintiff 500*l.* fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same 950*l.* on the 5th of November next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

The defendant demurs generally, and Mr. *Lingard*, *pro deficiente*, objected that the plaintiff had not shown the delivery of any receipts, or an impossibility of doing it, and cited, 1 Lutw. 245; Salk. 171.

Probyn, contra, answered, that there were mutual remedies, and therefore it need not be shown. 1 Saund. 319; 1 Lev. 274.

EYRE, J., doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept; to which Fortescue, J., inclined. *Sed per* PRATT, C. J. The time for payment of the money is certain at all events; but as for the delivery of the receipts, that was left uncertain, because it was impossible to fix the time for that, and if the defendant has made a foolish bargain in undertaking to pay the money on the 5th of November, whether he had the receipts or not, we cannot help him. The nature of these contracts is for the other party to give a deed obliging himself to deliver the stock, but even upon this agreement I should think the defendant would have his remedy. In the case of a deed-poll, if the lessee enters and enjoys the land, the other shall maintain debt for rent. and yet the whole is the words of the lessor.

Pasch. 8 Geo. It was argued a second time by *West*, *pro deficiente*. It will not be disputed but that generally speaking the word *pro* will create a condition precedent, 1 Vent. 147; 2 Mod. 33; 1 Lev. 87; Salk. 112, and that it will do so in this case, if I can clear it from two objections that have been made. 1. That here is a mutual remedy; and, 2. That here is a particular day fixed for the payment of the money.

As to the first, that is begging the question, for I take it there is not a mutual remedy, the words being the words of the defendant only, "That he will accept the subscription, and pay for the same;" which lays the plaintiff under no obligation to deliver the receipts. 1 Saund. 320.

2. As to the second objection, that here is a particular day appointed for payment of the money, I do admit, that if it appeared upon the contract that such a day must of necessity happen before the receipts could be delivered, it would then be very difficult to answer it; but that is not this case, for the company might if they pleased have given

out the receipts; and that brings the case within the distinction laid down by Lord Chief Justice Holt in the case of *Thorpe v. Thorpe*, Salk. 171. Besides, it is observable that this is an entire covenant to accept and pay, so that he is not to pay till he can accept. Lutw. 490.

Reeve, contra. I admit the first part of Mr. West's argument, but insist on the two objections he has taken notice of, as sufficient to bring this case out of the reach of that general doctrine.

Here is a certain sum to be paid at a certain day, and that too before the other part of the contract could possibly be performed. The Court will take notice of the South Sea Acts, and by that of 7 Geo. Stat. 2, it appears the receipts could not be delivered by the 5th of November; so that this case falls within the first distinction of *Thorpe v. Thorpe*, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; because it appears the party relied upon his remedy.

But then, say they, here is no mutual remedy. But I take it that, this being an agreement by indenture, the Court will intend it was executed by both parties. As to the cases, they are all of parol agreements, where a consideration must appear to make it a binding promise; but here the action will be maintainable on the bare covenant to pay, without any consideration at all, and therefore the *pro*, &c., may be left out.

ADJOURNATUR. And this Term PRATT, C. J., delivered the resolution of the Court.

This is an action upon a deed-poll made by the defendant, and whereby he covenants to accept so much stock, and to pay for the same; and the plaintiff in an action for the money has not averred a delivery or tender of the stock, and for this fault we are all of opinion the declaration is not good.

The intent of the parties appears to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed-poll of the defendant only; and therefore, though upon delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant on the other side, upon payment of the money, will have no remedy to compel the delivery of the stock; and having no such remedy he shall not be obliged to pay the money till the consideration for which it is payable is performed.

The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties: in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect; and this is proved by 7 Co. 10, and 1 Inst. 204, where the annuity *pro una acra*, says the book, supposes the acre to be first granted.

The case of *Callonel v. Briggs* (Salk. 112) was not so strong, for there

was a promise to transfer, which gave a mutual remedy, but yet Holt, C. J., held the plaintiff to show a tender, because that was the consideration for the defendant's payment of the money. And the case he there puts, of the sale of a horse for 10*l.*, is exactly the same with this.

The resolutions that were mentioned at the bar of the case of Thorpe v. Thorpe, are all founded on great reason; and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed-poll is likewise taken and allowed in the case of Pordage v. Cole, 1 Saund. 320, where the Court were of opinion the defendant had his remedy, "otherwise (says the book) it would have been, if the deed had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

JOHN THOMAS v. MARGARET CADWALLADER, *Adminis-*
tratrix of CHARLES CADWALLADER.

IN THE COMMON PLEAS, NOVEMBER 24, 1744.

[Reported in *Willes*, 496.]

COVENANT. The plaintiff declares upon an indenture dated 10th of February, 1720, whereby the plaintiff and one Rebecca Thomas, since deceased, demised to Charles Cadwallader a messuage and tenement in Bishop's Castle with the stable, mill, garden, and backside or yard thereto belonging (except as therein excepted), to hold the same from the 25th of March then next for twenty-one years under the rent of 10*l.* a year, payable at Michaelmas and Lady-day. And the said Charles did thereby covenant for himself, his executors, administrators, and assigns, to and with the said John Thomas, his heirs and assigns, that he, the said Charles, his executors, administrators, and assigns, should and would, from time to time and at all times during the said term, uphold, maintain, repair, and keep the said messuage and other the demised buildings thereto belonging in good and sufficient repair, and the same, at the end or sooner determination of the said term, should and would surrender and yield up to the said John and Rebecca, their heirs and assigns, in good and tenantable order and repair, he, the said John, his heirs and assigns, finding, allowing, and assigning timber sufficient for such reparations during the said term, to be cut and carried by the said Charles, his executors, administrators, and assigns.

And the plaintiff sets forth that Charles entered by virtue of the said

indenture, and being possessed of the said demised premises, died at Ludlow, on the 22d of April, 1735; and that administration of all his goods, &c., with his will annexed, was afterwards duly granted to the defendant, who by virtue thereof entered upon the demised premises, and was possessed thereof until the end of the said term, and that at the end of the said term of twenty-one years, and for the space of five years then before, the said messuage and other the demised buildings thereto belonging were greatly ruinous and in decay, and wanted necessary reparations and amendments; and that the defendant during her possession of the said messuage, &c., did not uphold, maintain, repair, and keep the same in good and sufficient repair, and the same at the end of the said term surrender and yield up in good and sufficient order and reparation, but at the end of the said term left the same so in decay, and wanting great reparations as aforesaid; contrary to the form and effect of the said covenant, &c.; and lays his damage at 100*l*.

The defendant pleads that the plaintiff during the said term did not find, allow, or assign timber sufficient for upholding, repairing, maintaining, or keeping the said messuage and other the said demised premises in good and sufficient repair; to which the plaintiff demurs generally, and the defendant joins in demurrer.

And upon this it came in judgment before the Court.

Bootle, Serjt., for the plaintiff, insisted on three things:—

1. That the plea was too general; it only saying that the plaintiff during the term did not find, &c.

2. That the finding of timber by the plaintiff was not a condition precedent, but a mutual or reciprocal covenant; and consequently that the breach of it cannot be pleaded to an action brought on the covenant of the lessee.

3. That if it could be insisted on by way of plea, yet that a request ought to have been pleaded.

And he cited the case of *Warren v. Asters*, Sir Tho. Jon. 206, where the lessor covenanted that the lessee should have liberty to cut trees ~~for~~ repairing,¹ he making good the fences and ditches, and it was holden not to be a condition, but a mutual covenant. That the word “paying” has been held to be a covenant and not a condition.² And he cited a case in B. R., reported in *Lucas*,³ 153, 189, and 222, where it was held that, if a man covenanted to pay money due on a judgment to a person, he assigning the judgment, in an action of covenant brought for non-payment of the money, the defendant could not insist that the plaintiff.

¹ This case is not accurately stated. It was an action of trespass by a lessee for years; to which the defendant pleaded that Martin, who had leased to the plaintiff, excepted the trees with liberty to cut and carry them away, he mending the fences and filling up the pits, and that Martin afterwards granted the trees and the liberty to the defendant; and then he justified under this liberty, &c. The plaintiff demurred, and showed for cause that the defendant had not alleged that he had mended the fences and filled up the pits; but it was not allowed, because it was not a condition, but a covenant for which the lessee had a remedy by action.

² The case of *Sir George Bickerstaffe*, cited *ib*.

³ 10 *Modern*.

had not assigned the judgment, it being a mutual covenant and not a condition precedent. He cited likewise 3 Lev. 41; the case of *Pordage v. Cole*, 1 Saund. 319; and 1 Rol. Abr. 518, the case of *Holder v. Taylor*; to show that these words in the present case are not to be considered as a condition, but as a mutual covenant. But in the case cited out of Rolle, the words are plainly words of covenant; and it is there said that if the words had been that the lessee should repair, provided the lessor find him great timber for it, they would not have been considered as a covenant on the part of the lessor, but as a qualification of the covenant of the lessee; so that this case is rather an authority against the plaintiff.

He insisted likewise that if this were necessary to be done by the plaintiff, yet that the first act was to be done by the lessee; for that he was to request the plaintiff to find the timber; and that he ought likewise to show that these were such repairs for which timber was necessary, for which purpose he cited 1 Rol. Abr. 465. pl. 28.¹

Hayward, Serjt., for the defendant, did not much insist that the plea was good, but said that the declaration was bad; and that then it was immaterial whether the plea were good or not. He said that these could not be considered as mutual covenants, for that the finding of timber was a condition precedent, or the qualification of the lessee's covenant. That *ipso faciente* and *si ipse fecerit* have exactly the same meaning; and that if the words had been *si ipse invenerit*, it had undoubtedly been a condition precedent. That the breach therefore is not assigned upon the covenant in the deed; for the covenant to repair is a qualified covenant, and *sub modo*, and the breach is assigned of an absolute covenant to repair. He cited the case of *Large v. Cheshire*, 1 Ventr. 147; 1 Rol. Abr. 414; and 2 Danvers, 229, title "Covenant," (C), ss. 2 and 3, where it is holden that though the word "agreed" makes a covenant, yet that "provided always" makes no covenant, but is a condition precedent. And he put the case that a man should covenant with A. to go to York, A. finding him a horse for that purpose; where it was plain that the covenantor was not obliged to go to York unless A. provided him a horse; which case (he said) was exactly parallel with the present. He therefore insisted that the plaintiff ought to have set forth in his declaration that he was always ready to find and assign him timber, and that not having done so the declaration was insufficient.

We were all of that opinion, and gave no opinion upon the plea.

I thought that none of the cases, though in my opinion they had gone too far already, came up to the present case, for that this finding

¹ *Holder v. Taylor*. "If a man lease a mill for years, and the lessee covenant to repair the mill, and the lessor covenant to find him great timber for it, the lessee ought to give notice to the lessor how much will suffice for the reparation, and not demand in general timber for reparation; otherwise the lessor is not bound to deliver any"

of timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant. When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other; and therefore I held that all the cases were right where nothing more was determined. The case of assigning the judgment is plainly different; for a man may pay the money before the judgment is assigned. The case of paying rent is also different, because a man may enjoy the land, nay, ought to enjoy it, before he pays rent. The case of repairing the hedges and fences likewise stands on the same reason; for there the wood must be cut down before the hedges and ditches are mended. But a man cannot repair until the timber is assigned him for such repairs. And the case in 1 Rol. Abr. 518, and that in Danvers, 229, are strong authorities for the defendant; for the word "provided," which was there holden to make a condition, is not so strong an expression as the words "finding and allowing" in the present case. But I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuitry of action and multiplying actions, both which the law so much abhors. If therefore this were a new point, I should be inclined to be of opinion that, though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification.

And my brothers Abney and Burnett being both of the same opinion with me,

Judgment was given for the defendant.

KINGSTON v. PRESTON.

IN THE KING'S BENCH, EASTER TERM, 1773.

[Reported in 2 Douglas, 689.¹]

THIS was an action of debt for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated: That, by articles made the 24th of March, 1770, the plaintiff, for the considerations thereafter mentioned, covenanted with the defendant to serve him for one year and a quarter next ensuing, as a covenant servant, in his trade of a silk-mercier, at 200*l.* a year, and, in consideration of the premises, the defendant covenanted that, at the end of the year and a quarter, he would give up his business of a mercier to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for fourteen years, and from and immediately after the execution of the said deeds the defendant would permit the said young traders to carry on the said business in the defendant's house. Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock-in-trade, at a fair valuation, with the defendant's nephew, or such other person, &c., and execute such deeds of partnership, and, further, that the plaintiff should and would, at and before the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of 250*l.* monthly to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to 4,000*l.* Then the plaintiff averred that he had performed and been ready to perform his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business at the end of the said year and a quarter. The defendant pleaded: 1. That the plaintiff did not offer sufficient security; and, 2, That he did not give sufficient security for the payment of the 250*l.*, &c. And the plaintiff demurred generally to both pleas. On the part of the plaintiff, the case was argued by Mr. *Buller*, who contended that the covenants were mutual and independent, and therefore a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff in a separate action. On the other side, Mr. *Gross* insisted that the covenants were dependent in their nature, and therefore performance must be alleged. The security to be given for the money was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement so as to oblige

¹ Also reported in *Lofft*, 194.

the defendant to give up a beneficial business, and valuable stock-in-trade, and trust to the plaintiff's personal security (who might, and indeed was admitted to be worth nothing), for the performance of his part.

In delivering the judgment of the Court, LORD MANSFIELD expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. His lordship then proceeded to say, *that* the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the Court, it would be the greatest injustice if the plaintiff should prevail. (The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent.¹ Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent.

BOONE v. EYRE.

IN THE KING'S BENCH, EASTER TERM, 1777.

[Reported in 1 *Henry Blackstone*, 273, *note*.]

COVENANT on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* per annum for his life; and covenanted that he

¹ *Roberts v. Brett*, 11 H. L. C. 337, *acc.*

had a good title to the plantation, and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that, the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea: that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

LORD MANSFIELD. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

*Judgment for the plaintiff.*¹

THE DUKE OF ST. ALBANS *v.* SHORE.

IN THE COMMON PLEAS, JUNE 29, 1789.

[Reported in 1 *Henry Blackstone*, 270.]

DEBT for 500*l.*, the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and defendant on the 30th of March, 1878, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and half of boggy land, at the price

¹ Ashhurst, J., added, according to a statement by Lord Kenyon in *Campbell v. Jones*, 6 T. R. 570, 573: "There is a difference between executed and executory covenants; here the covenants are executed in part, and the defendant ought not to keep the estate, because the plaintiff has not title to a few negroes."

Boone v. Eyre, 2 W. Bl. 1312, was an action between the same parties, brought for later instalments of the annuity. The defendant pleaded breaches of covenant on the part of the plaintiff. *Walker*, for the plaintiff, said, "As to the four last pleas, the matter contained therein is clearly matter of covenant, for which (if founded in fact) the defendant might bring his action; but it is a known rule that covenant cannot be pleaded against covenant." *Glyn*, for the defendant, "would not deny the principle laid down by *Walker*, but only its application to the present case. This is not a case of mutual covenants, where one is a consideration for the other; but here, the performance of the plaintiff's covenant is made a condition precedent to the performance of those of the defendant. But *per De Grey*, C. J. Where the participle 'doing,' 'performing,' &c., is prefixed to a covenant by another person, it is clearly a mutual covenant, and not a condition precedent: *Hunlocke and Blacklowe*, 2 Saund. 155."

See also *Carpenter v. Cresswell*, 4 Bing. 409; *Rose v. Poulton*, 2 B. & Ad. 822; *Fearon v. Aylesford*, 14 Q. B. D. 792.

of 2,594*l.*, which was to be paid at Lady-day then next in the following manner: the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of 1,820*l.* (to be deducted from the before-mentioned sum of 2,594*l.*), the defendant to convey those premises at the expense of the plaintiff unless a fine should be necessary, the expense of which the defendant was to pay; and the plaintiff to make a good title to the defendant at his (the defendant's) expense, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. All timber-trees, elms, and willow-trees, which then were upon any of the above estates, to be fairly valued by two appraisers, and the prices or values thereof to be paid by the respective purchasers of the estates at the time before mentioned; the rents of the respective estates to be received by the owners till the 24th of March then next. It was also agreed that, in case the plaintiff should not be enabled to make a good title to the said estate before the said 24th of March, that agreement should be void. And although the plaintiff had done and performed every thing on his part, &c., yet, protesting that the defendant had not done any thing on his part, &c., "in fact, the said duke saith, that he the said duke always from the time of the making of the said articles of agreement, until and upon the said twenty-fourth day of March next ensuing the date thereof, and always since hath been, and is, capable, ready, and willing to make a good title to the said William Shore of the said farm and premises, and boggy land so agreed to be purchased by the said William Shore as aforesaid, and to execute and cause to be executed necessary and proper conveyances and assurances of the said farm and premises, and boggy lands, to the said William Shore, if the said William Shore would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at Hanworth aforesaid: And the said duke avers that he the said duke, before the twenty-fifth day of March, being Lady-day, 1788, to wit, on the twenty-second day of March, A. D. 1788, at Hanworth aforesaid, gave notice to the said William Shore, that he the said duke was ready and willing at any time to make a good title to the said William Shore of the said farm and premises and land, so agreed to be purchased by the said William Shore, and to execute and cause to be executed proper deeds, conveyances, and assurances for that purpose, if the said William Shore would prepare the same, he the said duke then and there being, and still being, enabled to make, and capable of making, a good title to the said William Shore of the said farm and premises and land, according to the form and effect of the said articles: yet the said William Shore did not, nor would, on or before the said twenty-fourth day of March next ensuing the date of the said articles of agreement, nor hath he at any time hitherto, drawn or prepared, or caused to be drawn or prepared to be executed any deed, conveyance, or assurance whatsoever,

of the said farm and premises and lands mentioned in the said articles of agreement, and so agreed to be purchased by the said William Shore as aforesaid, nor did, nor would pay the said purchase-money or any part thereof, nor did, nor would accept the said title according to the said articles of agreement; but, on the contrary thereof, the said William Shore hath wholly neglected and refused, and still doth neglect and refuse, to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said William Shore, or to pay the said purchase-money or any part thereof, or in any wise to carry the said articles into execution, contrary," &c.

Plea: "That the said duke was not capable, ready, and willing to make, nor could he, the said duke, make a good title to the said William of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, &c. And for further plea, &c., that after the making of the said agreement, and before Lady-day then next following, to wit, on the twentieth of March, A.D. 1788, the said duke cut down divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow-trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, whereby the said duke disabled himself from performing, and it became, and was impossible, for him to perform and fulfil the said articles of agreement, on his part, &c.; for which reason he, the said William, declined and refused to carry the said articles into execution on his part, as he lawfully might," &c.

Replication: Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in Hilary Term last, by *Lawrence*, Serjt., for the plaintiff, and *Bond*, Serjt., for the defendant, and a second time in Easter Term, by *Le Blanc*, Serjt., for the plaintiff, and *Marshall*, Serjt., for the defendant.

The arguments in support of the demurrer were in substance as follow:—

The articles of agreement in this case divide themselves into two branches. First, that the defendant was to purchase of the plaintiff a farm, &c., for 2594*l.*, in part of payment for which the plaintiff was to accept a conveyance of other premises. Secondly, that the trees growing upon any of the estates should be valued and paid for by the respective purchasers. The object of the plea is to show that the plaintiff, having cut down trees on his estate, was incapable of performing his part of the agreement, and, therefore, that the defendant was not bound to perform the other part. In order to support the plea, it must be proved that the matter contained in it was a precedent condition; for if it were not such a condition, the non-performance of it cannot be pleaded in bar. Where one part of an agreement is not the consideration of the other, non-performance of one part cannot be pleaded as an excuse for the non-performance of the other. In this

Shore could not be made

case, the agreement respecting the trees was no part of the consideration of the act which the defendant was to perform, namely, to convey his estate, and pay the residue of the purchase-money. Where there are mutual remedies, it would be unjust that the breach of one covenant should be alleged as a reason for the breach of another, because the damages arising from the one might be unequal to those occasioned by the other. The case of *Boone v. Eyre* was similar to the present: there the covenant was for well and truly performing, &c., the breach was non-payment, and the plea in bar, that the plaintiff was not legally possessed of the negroes on the plantation. There Lord Mansfield said, if the plea were allowed, any one negro not being the property of the plaintiff would bar the action. So here, if this plea were allowed, any one tree being cut down would be a bar to the plaintiff's demand. In *Hunlocke v. Blacklowe*, 2 Saund. 155, the terms of the agreement were as strong as the present, but there a similar plea was not allowed. To the same effect, also, is *Cole v. Shallett*, 3 Lev. 41. Though these were actions of covenant, yet the statute of 8 & 9 Will. III., c. 11, has put actions of covenant and debt for a penalty on nearly the same footing, as in neither more than the real damages sustained can be recovered.

On the part of the defendant, three objections were made to the declaration: 1st. That the plaintiff had not shown a sufficient performance of his part of the agreement to entitle him to bring an action for the penalty. The conditions in this case seem to be what Lord Mansfield calls "dependent conditions," in which the performance of one depends on the prior performance of the other; and, therefore, till the prior condition be performed, the other party is not liable to an action for the non-performance of his part. Dougl. 691. It is not enough for the plaintiff to aver that he is ready and willing to perform his part; the defendant is not obliged to convey his estate to the plaintiff before the plaintiff conveys to him. Even in covenant to recover damages for the non-performance of this agreement, the plaintiff must have shown that he had actually done all in his power to perform his part; but this being debt for the penalty, an action of a more harsh nature, the plaintiff must show a precise performance; which is made a condition precedent. A court of equity, on the same principle, will not decree a specific performance of an agreement, unless the party applying for the decree has exactly performed his part. Wherever performance is necessary to be averred, it must be shown with such certainty that the Court may judge whether the intent of the covenant be performed. 5 Com. Dig. 43. To make a good title means to convey by a good title; and he who is bound to convey is bound to prepare and tender such conveyances as are proper to make a good title to the grantee. 1 Roll. Abr. 465, l. 3; 2 Lev. 95; 1 Ventr. 255; 1 Mod. 104. If it be said that the defendant must prepare the conveyances, because he is to pay the expense of them, the answer is that the law is otherwise. If nothing be said of the expense, it shall

be defrayed by the grantor. 1 Roll. Abr. 422, l. 50. But where the grantee is to pay the costs, yet the grantor must prepare the conveyances. Cro. Eliz. 517. If he be bound to assure at the charge of the grantee, he must give notice what sort of conveyance he will make. Halling's Case, 5 Co. 22 b. In the present case, as neither party has done any act towards conveying their respective estates, neither can bring an action for the penalty. But if it should be holden that the defendant was bound to prepare the conveyances because he was to pay the expense, yet the plaintiff has not shown a sufficient performance, since, for any thing that appears, a fine might be necessary: and as such fine was to be at the expense of the plaintiff, and he was bound to levy it if necessary, he ought to have shown either that he had levied it or that it was not necessary. But supposing the defendant was bound to prepare the conveyance from the plaintiff, then must the plaintiff be bound to prepare the conveyance from the defendant. If so, the plaintiff ought to have stated, not only that he had offered to make a good title to the defendant, but also that he had prepared a conveyance from the defendant to him, had tendered it to the defendant to be executed, and demanded the difference in value; but that the defendant had neither prepared a conveyance from the plaintiff to him, executed the conveyance from him to the plaintiff, nor paid the difference.

The second objection to the declaration is, that the plaintiff only states that he was ready and willing to make a good title, but does not show what title. If he in fact had no title, or could not make one to the defendant, the agreement was void by the terms of it, and it would be impossible for him to recover; this title is therefore an essential part of the case. But the validity of the title is a matter for the cognizance of the Court, and therefore it must appear on the record, that the Court may judge of it, and the defendant take issue on any of the facts which support it, if untrue, or demur if it be insufficient. Here the performance is stated so generally, that no precise issue can be taken on it. In covenant, the breach may be assigned as large as the covenant, because damages only are to be recovered (but in debt for a penalty a precise breach must be shown, because a breach is a forfeiture of the whole bond.) 1 Ld. Raym. 107. No issue can be taken on the word "patron" or "heir." 1 Ld. Raym. 202. But the word "title" is of much more vague signification than either "patron" or "heir." Where any thing is to be done as a precedent condition, an averment that the party was ready and willing to do it is insufficient; neither is an averment *paratus fuit* and *obtulit* sufficient, unless he states that he was hindered by the other party, 2 Saund. 350, 1 Roll. Abr. 465, l. 40: but *paratus fuit* and *obtulit* is sufficient where nothing is to be done on his part before the other has done a prior act. *Ibid.* The plaintiff, therefore, ought here to have shown that he had actually made a good title to the defendant, and what that title was. Hob. 69, 77; Cro. Jac. 315, 425, 503; Cro. Eliz. 919; Yelv. 49; Sid. 467; Doug. 620.

The third objection to the declaration is, that there are three breaches assigned in an action of debt, but it is not stated to be according to the form of the statute; for as before the Stat. 8 & 9 W. III., c. 11, only one breach could be assigned in an action of debt, if many be now assigned, notice must be taken of the statute in pleading. But the breaches themselves do not meet the covenant, not being breaches of the contract stated. They are: 1st. That the defendant did not draw or prepare any conveyance. 2d. That he did not pay the purchase-money. 3d. That he would not accept the title. Now a breach should be assigned in the words of the covenant; or at least it must contain the plain and obvious meaning of the covenant. But it has been proved that the defendant was not bound to prepare the conveyance. The agreement also was that he should satisfy the plaintiff, partly by conveying certain premises to him, and by paying him the remainder in money, not that he should pay the whole in money. This breach, therefore, ought to have been, that the defendant did not convey to the plaintiff the premises which he agreed to convey, nor pay the difference. As to the third breach, it would have been proper if the plaintiff had shown a sufficient performance on his part; but the defendant could not accept till the plaintiff had actually executed the conveyances.

With respect to the plea, it is to be observed that the agreement is not in two parts; the clause relating to the trees is not a new contract of sale, but the mode of valuation. It was understood that they were to go with the land. They were to be paid for by the respective purchasers; that is, by the purchasers of the land on which they grew, and were considered as part of the purchase. The value of land with timber growing on it can only be fairly estimated by an appraisement of the timber. But a grant of land passes all woods and timber growing on it; Co. Lit. 4 a; the appraisement is only to ascertain the value. Small timber growing is of great value, which if cut would be worth nothing. Thriving timber will pay 10 or 15 per cent. for the purchase-money, and without it the land may be of no value. If there be a covenant to leave all timber on the land, it is a breach for the party to cut them down, though he leave them. Sir Tho. Raym. 464. If the plaintiff has cut down any of the trees, he is not entitled to the penalty, because he has deprived the estate of certain qualities which were an inducement to the defendant to contract. Admitting the authority of *Boone v. Eyre*, it is not applicable to the present case; there the value of the plantation was not altered by the loss of some of the negroes. No case has been adduced where the subject-matter of the contract was changed. This is one entire contract. The sale of the land is the sale of the timber. The defendant is called upon to pay for a thing different from that for which he agreed. Various cases might be put where there may be an agreement for the purchase of one entire thing, and a particular mode of valuing a part of it.

It was replied.

That although it was objected that the plaintiff had not shown a sufficient performance on his part, yet he had stated that he was capable, ready, and willing to make a good title, and of which he had given notice to the defendant. This was sufficient. The plaintiff was not bound to execute the conveyances, unless the defendant had drawn and paid for them. As to the cases cited, where it was holden insufficient to state that the party was ready and willing to perform his part, there some specific, certain act was to be done; in which case, performance was necessary to be averred. But here the plaintiff was to make no conveyance without the consent of the defendant. The first class of cases only shows at whose expense conveyances were to be made, where there was no express agreement; but here, by the covenant, the defendant was to pay it. As to the objection that a fine might have been necessary, that is answered by stating that the plaintiff gave notice to the defendant that he was ready and willing at any time to make a good title. If a fine were necessary, the defendant ought to show that it was necessary; the plaintiff agreed to levy it only if it were necessary. As to the case where the word "patron" was not sufficiently certain to take issue upon, it was in *quare impedit*, where the party was obliged to make out a title to himself, ~~and show an actual presentation~~. In the other class of cases cited, where the words "ready and willing" were holden not sufficient, an absolute performance was necessary to be stated, because it was wholly in the power of the party to perform the act required. But where two things are to be done at the same time by different parties, it is enough for the party declaring to state that he was ready and willing to perform his part; especially where money is to be paid for the conveyance of an estate, in which case the party to whom the estate is to be conveyed is not forced to pay, unless the other is ready and willing to convey. The ground of the decision in Cro. Jac. 315, was, that the plaintiff ought to have shown by what title the plaintiff in ejectment recovered, since it might have been by his own conveyance, and then, though the facts alleged were true, still there might be no breach of covenant. On this principle the case of *Noble v. King*¹ was decided in this court. So, also, in the other cases cited, where there were covenants for good title and quiet enjoyment, it was necessary to state the title of those by whom the parties were evicted or disturbed, because the facts alleged might be true, and yet the covenants might not be broken. The case cited from Yelverton, 49, was decided principally on the ground that the declaration ought to have shown that B., the person who was to become bound according to the agreement, was in fact bound.

As to the third objection to the declaration, namely, that the breaches are not stated to be assigned by virtue of the statute; that is matter of form, and not to be taken advantage of on a general demurrer. As to the objection that they are not breaches of the agreement stated, it is to be observed that they are in substance and truth breaches of the agreement. It sufficiently appears from them, that the defendant did

¹ 1 H. Bl. 34.

not do what he was bound to do, that he neither prepared the conveyances, paid the purchase-money, or accepted the title of the plaintiff. He ought by some act on his part to have enabled the plaintiff to have done what he had agreed to do, namely, to convey, &c. No answer has been given to the case of *Boone v. Eyre*, where the negroes were to pass with the land, as the trees in this case. There the damages for the loss of the negroes were unequal to those which would have accrued to the other party. There also a gross sum was stipulated for the negroes, together with the plantation; here, there was only an agreement for a valuation. If any tree had been cut down, the defendant would have paid so much the less; and if there was any ideal value annexed to the growing timber, he ought to have stated it. (The whole contract is not to be rescinded by an alteration in the trees on the land, which were to be the subject of a separate valuation.

Cur. adv. vult.

On this day the following judgment of the Court was delivered by LORD LOUGHBOROUGH, who, having stated the pleadings, said:—

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant (if I may use the expression), he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is, and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of *Boone v. Eyre* was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; and for this plain and obvious reason, because the damages might be unequal. The cases also of *Hunlocke v. Blacklowe*, 2 Saund. 155, and *Cole v. Shallett*, 3 Lev. 41, were cited as being in favor of the plaintiff. But it is unnecessary to enter into the discussion of those cases, though perhaps doubts may reasonably be entertained of the doctrine laid down in *Saunders*, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the Court. For we found our opinion in the present case on the ground of the distinction in *Boone v. Eyre*, which we think a fair and sound one. Then the question is, Whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant? Now the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from

specific damages but are separately stated.

the estate by the separate valuation of it. It was expressly agreed that all trees, &c., which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it between the time of entering into the contract and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not; for if it may be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty, on the other party refusing to execute a contract. [But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment. My brother Marshall made some exceptions to the declaration, which it is not necessary to go into, but which, speaking for myself, I think material. It is to be observed, that this is not a contract absolutely and at all events to convey, Where a man undertakes to convey, he undertakes to convey by a good title. There are cases where a court of equity has holden that a party so undertaking might make a title by procuring an act of Parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case, if the plaintiff was not enabled to make a good title before a certain day, the agreement was to be at an end, he might be off and was released from his engagement. He therefore undertook to make a good title before a given time; the breach assigned is, that the defendant refused to accept the title. But what title? What exhibition of title? What title was tendered to him? What was there for him to accept? This, perhaps, is rather *dehors* the question, though it might be material if it were necessary to take it into consideration.¹ But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the Court of King's Bench in the case of *Boone v. Eyre*.
*Judgment for the defendant.*²

¹ In *Phillips v. Fielding*, 2 H. Bl. 123, the declaration was held bad because it did not set out the title of the plaintiff. But this case was overruled by *Martin v. Smith*, 6 East, 555. See also *Ferry v. Williams*, 8 Taunt. 62.

² *Behrman v. Newton*, 103 Ala. 525, 530; *Smyth v. Sturges*, 108 N. Y. 495, *acc.*

See *Ames's Cas. Eq. Jur. I.* 245, as to the jurisdiction of equity to compel the vendee to take with compensation property slightly varying from the agreement.

In *Poole v. Hill*, 6 M. & W. 835, an action of covenant by the vendor for the failure of the vendee to complete a purchase of real estate, the declaration alleged that the plaintiff was ready and willing to convey, but made no allegation of tender. The defendant demurred. Lord Abinger, C. B., in delivering the judgment of the court, said: "We were at first disposed to think that the averment that the plaintiff was ready and willing to convey was insufficient; but after hearing the point discussed by Mr. Crompton, we are satisfied that it was not necessary to aver more than this. On a contract for the sale of lands, unless it be expressly stipulated otherwise, the convey-

GOODISSON v. NUNN.

IN THE KING'S BENCH, JUNE 19, 1792.

[Reported in 4 Term Reports, 761.]

THIS was an action of debt to recover 21*l*. on certain articles of agreement, the substance of which was stated in the declaration. The defendant cravedoyer of the agreement, by which the plaintiff agreed that he would, on or before the 2d of September then next, "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise, advise, or require,¹ well and sufficiently grant, sell, release, assign, and surrender, or otherwise convey to the defendant all that copyhold tenement, lying," &c. In consideration whereof the defendant covenanted to pay to the plaintiff the sum of 210*l*. on or before the second day of September next ensuing; on failure of complying with the before-mentioned agreement the defendant was to pay to the plaintiff the sum of 21*l*.; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay to the defendant the sum of 21*l*. It was further agreed between the parties that the plaintiff should take up the copyhold as follows, that is to say: "That the plaintiff should take it up either for the defendant or his wife, as they should agree at the time; that the plaintiff should take it up for himself; that each party should pay share and share alike towards the expenses attending the taking it up." The defendant then pleaded, 1st. *Non est factum*. 2d. That the plaintiff did not, on or before the second day of September next, &c., by such conveyances, assurances, surrenders, ways, and means in the law, reasonably devised, advised, and required, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises in the said articles of agreement mentioned, &c. 3d. That the plaintiff did not on or before the second day of September, &c., or at any time since, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises,

ance is to be at the expense of and to be prepared by the purchaser. Here it was for the purchaser to make out the conveyance in the usual course; that being done, his agreement is on a given day to pay the purchase-money, and the plaintiff's to execute the conveyance and complete the title. The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tendered a conveyance. He was to perform the initiative before the plaintiff could be called upon to offer a conveyance, and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution. The declaration is therefore good, and the judgment will be for the plaintiff."

In the United States, however, the duty of preparing a conveyance devolves upon the vendor. 50 American Decisions, 673; Warvelle on Vendors (2d ed.), § 350; Leaird v. Smith, 44 N. Y. 618; Raudabaugh v. Hart, 61 Ohio St. 73, 87; Boyd v. McCullough, 137 Pa. 7.

¹ The agreement was drawn in this inaccurate manner.

&c. 4th. That the plaintiff, at the time of the making of the articles, &c., had nothing in the said premises, whereby he could be enabled to grant, &c., to the defendant the said premises, &c.

To the three last pleas the plaintiff demurred generally.

Wood, in support of the demurrer. The two first special pleas are drawn on a supposition that the conveyance by the plaintiff to the defendant is a condition precedent, and that the defendant is not liable on his covenant till the plaintiff has performed the covenant on his part. But, on the true construction of these articles, this was not a condition precedent on the plaintiff's part, but the covenants were mutual and independent, a breach of either of which gives the other party a right of action. If it had been agreed "that the defendant would, on a particular day, pay the money upon the plaintiff's conveying," that would have made the conveyance a condition precedent to the payment of the money. But here the parties have relied on the mutual covenants which each entered into with the other. Those covenants are general, not depending upon each other. The first is, that the plaintiff shall convey, &c., expressed in the most general terms; in consideration whereof (that is, in consideration of the plaintiff's covenant) the defendant covenanted to pay, &c., in terms equally general. In 1 Rol. Abr. 415, pl. 8, "If by articles of agreement between B. and C., by which B. covenants, for the consideration afterwards to be expressed, to convey certain lands to C. in fee, and after C. covenants on his part, for the consideration aforesaid, to pay B. 160*l.*, in this case, although B. does not assure the land to C., still C. is bound to pay the money; for the assurance of the land is not a condition precedent; but they are distinct and mutual covenants." So, in *Pordage v. Cole*, the plaintiff declared on a specialty, by which it was agreed that the defendant should give the plaintiff 775*l.* for all his lands, &c.; that the defendant had given the plaintiff 5*s.* as earnest; and that it was also agreed that the defendant should pay the plaintiff the residue of the 775*l.* at a certain time; and the breach was the non-payment of that residue. To this the defendant demurred, and objected that the plaintiff had not averred a conveyance on his part, or a tender of one; and there too the word "pro" was used, which, it was said in *Co. Lit.* 204*a*, makes a condition in matters executory; but it was held that the action was well brought, and that, if the plaintiff did not convey, the defendant had his remedy against him on the covenant. Again, in *Blackwell v. Nash*, the plaintiff declared that he covenanted to transfer to the defendant, at a certain time, so much stock, and that the defendant, in consideration of the premises, covenanted to accept and pay for it; he then averred that he was ready, and offered to transfer to the defendant, who refused to accept or pay, &c. On demurrer it was objected that "for it" made a condition precedent, and that the plaintiff should have shown an actual transfer of the stock; to which it was answered that they were mutual covenants, and that the plaintiff need not show a performance on his part; and it was held that in consider-

ation of the premises was in consideration of the covenant to transfer, and not of an actual transferring, for which the defendant had his remedy. [In answer to a question from the Court, whether this case could be distinguished from the late cases of *Kingston v. Preston*, *Jones v. Barclay*, and *Lord Aldborough v. Lord Newhaven*,¹ where the rule was established, that when two acts are to be done at the same time, neither party can maintain an action without showing performance, or an offer to perform on his part; which rule applied to all cases of sale; he said]: This case may be distinguished from those, because here the conveyance was to be such as the defendant should require. The words are "by such conveyances, &c., shall reasonably devise, advise, or require;" which evidently mean such as the defendant should wish. The first act was, therefore, to be done by the vendee, who should have directed what conveyance he wished to have. And by another part of the agreement the plaintiff was to take up the copyhold either for the defendant or his wife, as they should agree; then they should first have elected to whom it should be made. Now, if the first act were to be done by the defendant, this case differs from those alluded to.

LORD KENYON, C. J. This case is extremely clear, whether considered on principles of strict law or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay 210*l.*; and if he did not carry the contract into execution, he was to pay 21*l.* And now, not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was 40,000*l.*, it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go; but I think that the judges misapplied that principle. It is admitted in them all that where they are dependent covenants no action will lie by one party, unless he have performed or offered to perform his covenant.² Then the question is whether these are or are not dependent covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate, he was to receive the purchase-money; and when the other parted with his money, he was to have the estate. They were reciprocal acts to be performed by each other at the same time. It seems, from the case in *Strange*, that the judges were surprised at the old decisions; and, in order to get rid of the difficulty, they said that a tender and refusal would amount to a performance. It is true they went farther, and said that "in consideration of the premises"

¹ Mich. 21 Geo. III., B. R.

² In an action at law, it is universally conceded that if the covenants are dependent the plaintiff cannot recover without proving a tender. As to the rule in equity, see Ames's Cas. Eq. Jur. 342.

meant only in consideration of the covenant to transfer, and not in consideration of the actual transferring of the stock; but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to overrule it. [The principle is admitted in all the cases alluded to that, if they be dependent covenants, performance or the offer to perform must be pleaded on the one part, in order to found the action against the other.] The mistake has been in the misapplication of that principle in the cases cited. And I am glad to find that the old cases have been overruled, and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained.

BULLER, J. The agreement was that the plaintiff should sell his estate, and that the defendant should buy it. In the nature of the thing, therefore, the two acts are to be done together. In *Kingston v. Preston*, Lord Mansfield said: "The construction contended for is, that in spite of his teeth the defendant shall be obliged to give personal credit to the plaintiff; whereas the essence of the agreement was that neither should trust the other personally." The next case was *Jones v. Barclay*; there the plaintiff, who was the seller, stated that he had offered to assign and execute and deliver a general release, and had tendered a draft of an assignment and release, and offered to execute and deliver such assignment, but that the defendant had absolutely discharged him from executing the same, or any assignment and release whatsoever. The effect of that was to put an end to the contract; and therefore it was held that the plaintiff was entitled to damages; Lord Mansfield saying, "that the plaintiff had done every thing in his power to perform the agreement, and that the defendant only had been guilty of the neglect." Then followed the case of *Lord Aldborough v. Lord Newhaven*, in which it was said that the plaintiff must show either that he had assigned the house, or that he had tendered an assignment, before he could insist on payment, because both acts were to be done at the same time. And, in truth, if there had been no case in opposition to the ancient ones, I should not have been afraid of making a precedent, the principle on which our decision is founded being universally admitted in all the cases. A distinction, however, has been made between this case and those of *Kingston v. Preston*, &c., by saying that the defendant was to do the first act here, namely, to elect to whom the estate should be conveyed, whether to him or his wife. But there is no foundation for this distinction; for the first act was to be done by the plaintiff; the words are, "the said R. Goodisson shall take it up for himself;" he was first to be admitted, before he could surrender to the defendant.

GROSS, J. In a case in *Hobart*¹ there is a good deal of comment on the word *pro*, showing in what cases it operates as a condition precedent and where it does not. ~~But~~ notwithstanding some of the old authorities, the courts of later times have considered whether in reality

the first act is not to be performed by the seller, or at least whether they are not concurrent acts. There is so much good sense in the later decisions that it is too much to say that they are not law. There being several precedents in support of our decision, and those being founded in good sense and justice, I think we ought to take advantage of them. *Judgment for the defendant.*¹

Gibbs, who was to have argued for the defendant, mentioned the case of the Duke of St. Albans v. Shore, 1 H. Bl. Rep. 270, and Boome v. Eyre there cited.

MORTON v. LAMB.

IN THE KING'S BENCH, FEBRUARY 1, 1797.

[Reported in 7 Term Reports, 126.]

IN an action on the case, the plaintiff declared against the defendant, for that whereas, on the 10th February, 1796, at Manchester, in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant, had then and there bought of the defendant 200 quarters of wheat, at 5*l.* 0*s.* 6*d.* per quarter, such price to be therefor paid by the plaintiff to the defendant, he the defendant undertook and then and there promised the plaintiff to deliver the said corn to him the plaintiff at Shardlow, in the county of Derby, in one month from that time, viz., of the sale; and then he alleged that, although he the plaintiff always, from the time of making such sale for the space of one month then next following and afterwards, was ready and willing to receive the said corn at Shardlow, yet the defendant, not regarding his said promise, &c., did not in one month from the time of the making of such sale as aforesaid, or at any other time, deliver the said corn to the plaintiff, at Shardlow or elsewhere, although he the defendant was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Hobroyd obtained, in the last term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He said this was necessary on the principle established in many cases, particularly in *Tuorpe v. Thorpe*, *Callonel v. Briggs*, *Kingston v. Preston*, *Jones v. Barclay*, and *Goodisson v. Nunn*, that when something is to be done by both parties to a contract at the same time, as in this case the tendering

¹ *Pead v. Trull*, 173 Mass. 450; *Ackley v. Elwell*, 5 Halst. 304. *acc.*

of the money and the delivery of the corn, there the party suing the other for non-performance of his part must aver an offer at least at the same time to perform what was to be done by himself.

Law, Wood, and Scarlett now showed cause. The covenants here are mutual and independent, and each party has a remedy by action against the other for non-performance of his part. But if there be any precedence between them, the delivery of the goods ought in the regular order of things to precede the payment of the price. In neither case can the averment contended for be necessary. The distinction is taken in many cases that where two things are to be done, and the time of doing it is mentioned for one and not for the other, there the thing for doing which the time is stipulated must be done first, and so averred to be. *Pafford v. Webbe*, 2 Rol. Rep. 88; *Pordage v. Cole*, 1 Saund. 319; *Peters v. Opie*, 2 Saund. 352, 1 Vent. 177, 214; *Elwick v. Cudworth*, 1 Lutw. 493; *Hilton v. Smith*, ib. 496. So in *Thorpe v. Thorpe*, it was said by Holt, C. J., that if by the agreement a day certain is appointed for the payment of money, and this day is to happen before the act can be performed for which the money is to be paid, there, although the words are that he shall pay so much for the performance of the act, yet after the day appointed the party shall have his action for the money before the thing is performed. And that is a stronger case than the present, because the act for which the recompense is to be given ought in reason to precede the recompense itself. In *Blackwell v. Nash* the plaintiff declared in debt for a penalty on a covenant that he should transfer so much stock to the defendant on or before the 21st September, and that the defendant in consideration of the premises covenanted to accept and pay for it; and then the plaintiff averred that he was ready and offered to transfer the stock on that day, but that the defendant refused to accept or pay for it. It was objected in arrest of judgment that the actual transfer of the stock was a condition precedent which ought to have been averred, but the Court held that "in consideration of the premises" meant in consideration of the covenant to transfer, and not of an actual transferring, for which the defendant had his remedy; though if it did mean the latter, a tender and refusal would amount to performance. And they added that in all such cases the great question was, who was to do the first act? But that where the transfer was to be upon payment, there was no color to make the transfer a condition precedent. The same doctrine was held in *Dawson v. Myer*.¹ These cases went on the ground that the parties had mutual remedies on their reciprocal promises, and therefore there was no need of the averment contended for. But the case of *Meritt v. Rane*² applies as strongly in another point of view. There the plaintiff declared on an agreement that in consideration of 252*l.* paid to the defendant, he agreed to transfer 6,000*l.* South Sea stock to the plaintiff or his executors, &c., at any time before the 9th January, 1720, within three days

¹ 1 Str. 712.

² 1 Str. 458.

after demand in writing, upon payment of the further sum of 9,000*l.*; then he averred the demand in writing, and that he attended on the day, but that the defendant did not appear to transfer. One of the objections was, that the plaintiff had not averred that he had the money there on the day to have paid upon the transfer; but the Court said that as to the plaintiff's not showing a tender, that ought to have come from the defendant by way of excuse, that he was there ready to have transferred if the plaintiff had been there to have paid the money. To apply therefore the reasoning of all these authorities to the present case: Here the first act to be done was by the defendant, namely, the carrying of the corn to Shardlow; by not doing which he broke his agreement, and a cause of action accrued to the plaintiff according to that class of cases, wherein agreements of this sort have been construed to give mutual remedies to the parties. But admitting that he was not bound to deliver the corn there until the plaintiff was prepared to pay for it; still that ought to come from the defendant by way of excuse, and the tender of payment was not necessary to be averred by the plaintiff as a condition precedent to the right of action. The defendant might have shown, in excuse for the non-performance on his part, either that he carried the corn to the place, and was ready to have delivered it, but that the plaintiff was not there to receive it; or that the plaintiff refused to receive it; or that he was not ready to pay for it. *Lancashire v. Killingworth*, 12 Mod. 531, Salk. 624; *Ughtred's case*, 7 Co. 10. Where an action is brought for money due, the defendant may show in his defence a tender and refusal, or that he was prepared at the day and place appointed to pay the money, but that the plaintiff was not there to receive it; yet it never was held necessary for the plaintiff to aver in his declaration that he was ready to receive it. And here, if the readiness to pay had been averred, it could have answered no purpose; because no issue could have been taken on it. Besides, in no case is tender of payment necessary to be averred when the contract is executory, as it is in this case, for there the parties necessarily rely upon the mutual remedies arising out of it; they give mutual credit to each other. All the cases cited on the other side are, if strictly considered, cases of condition precedent. Several of them, as well as the subsequent cases of *Campbell v. Jones* and *Porter v. Shepherd*,¹ laid down the rule that whether covenants be or be not independent on each other must depend on the good sense of the thing; that is, who in the fair sense and meaning of the parties was required to do the first act. Now here there is no doubt that the first act was to be done by the defendant, which he neglected to do: and it would be absurd to require a person to pay for goods before he had received them; though if he were not ready to pay for them at the time when the other was ready to deliver them, that might be a reason for the non-delivery. But still that is only matter of defence and excuse on the part of the defendant, which it is incumbent on

¹ 8 T. R. 665.

him to show. And yet the effect of the averment required is, that the plaintiff was bound to tender the price before the goods were even offered to him.

Holroyd, contra: This action is not brought against the defendant for having omitted to carry the corn to Shardlow, even allowing that to be the first act to be done; and therefore much of the plaintiff's argument does not apply. But the ground of complaint is that it was not delivered to him there; and consequently, upon this form of declaring, it may be assumed that the defendant did carry the corn there. The question then comes to this, whether the defendant was bound to deliver his corn, the plaintiff not being there ready to pay for it. For if not, then it follows, according to all the late determinations, that he ought to have averred a tender of the price, or that he was there ready to pay for it, if the defendant had been there ready to receive it, and deliver the corn. And for this purpose it is not necessary to show that the tender of the price was a condition precedent, strictly so considered; for, according to *Goodisson v. Nunn* and *Kingston v. Preston*, if the acts are concurrent and in the nature of the transaction to be done at the same time, before one of the parties can maintain an action against the other for the non-performance of his part he must aver that he performed or was ready to perform every thing on his own part. *Callonel v. Briggs* is in point. That was an executory agreement, like the present, to pay so much money six months after the bargain, the plaintiff transferring stock. There Lord Holt said, "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; and this," says he, "though there be mutual promises. If I sell you my horse for 10*l.*, if you will have the horse, I must have the money; or if I will have the money, you must have the horse." Or, according to *Lancashire v. Killingworth*, the plaintiff should have averred that he was ready at the place to have received the corn on the last day of the time within which it was to be delivered, and ready and willing to have paid the price; but that no person was there on the part of the defendant to deliver the corn. The delivery of the corn and the payment of the price were concurrent acts to be done by the parties at the same time, the one depending on the other; and if so, then, within the principle of all the modern cases, the plaintiff ought to have averred in his declaration a tender of the price, for want of which it is bad.

LORD KENTON, C. J. If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do; but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the

plaintiff; to this declaration the defendant objects, and says, "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is, whether that should or should not have been alleged. The case decided by Lord Holt, in Salk. 112, if, indeed, so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it; but they do not appear to me to be applicable. In the one in Saunders,¹ the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned; but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell v. Jones, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done; but here both things — the delivery of the corn by one, and the payment by the other — were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

GROSE, J. It is difficult to reconcile all the cases in the books on the subject of conditions precedent; but the good sense to be extracted from them all is, that if one party covenant to do one thing in consideration of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance. Here the question is, what was the intention of the parties; they clearly intended that something should be done by each at the same time. The corn was to be delivered at Shardlow to the plaintiff for a certain price to be therefor paid by him, that is, at the time of the delivery; then the readiness to pay should have been averred by the plaintiff.

LAWRENCE, J. It has been argued, on behalf of the plaintiff, that this must be considered as a declaration on mutual promises, and that

¹ 2 Saund. 250.

as this is a demand on the defendant on the ground of some mutual promise made by him, and which was the consideration of the plaintiff's promise, it was not necessary to aver performance on his part; but, if so, the declaration is not adapted to the truth of the case in not stating that the defendant's promise was in consideration of the plaintiff's. But on this declaration I can only consider it as an agreement by the defendant to deliver the corn at Shardlow on being paid for it. The payment of the money was to be an act concurrent with the delivery; and then the case is like that of *Callonel v. Briggs*, which was on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock; and there Lord Holt said, "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender." He did not say that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration; and that affords an answer to great part of the argument urged on behalf of the defendant in this case. The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title. The strongest case cited for the defendant was that of *Merrit v. Rane*;¹ but that does not appear to me of sufficient weight to overturn the authority of the case of *Callonel v. Briggs*. I do not quite understand what the Court there said, that it was not necessary to allege a tender, for that it should have come from the defendant by way of excuse; for, as it was stated that the plaintiff's agent was ready to receive a transfer of the stock, but that the defendant did not attend, it would have been absurd to state a tender of the money to a person who was not present to receive it. There is, however, another case, not referred to in the argument, *Lea v. Exelby*, which is an authority to show that the plaintiff in this case should have averred a tender. There the plaintiff declared that in consideration that he had promised to pay the defendant (who was possessed of a lease for years, the inheritance of which was in the plaintiff), a certain sum on such a day, the defendant promised on payment to surrender to him the lease; and that he had tendered the money at the time, but that the defendant had not surrendered; and on motion in arrest of judgment, because it was not alleged that the defendant refused as well as that the plaintiff tendered, the Court held that the declaration was bad for that reason. Therefore, on the authority of that case, and of that of *Callonel v. Briggs*, I am of opinion that the declaration cannot be supported, and that the judgment must be arrested.

*Rule absolute.*¹

¹ *Brennan v. Ford*, 46 Cal. 7, 16; *Dunham v. Pettee*, 8 N. Y. 508, acc. See also *Rawson v. Johnson*, 1 East, 203; English Sale of Goods Act, sec. 28; *Mechem on Sales*, § 538.

WITHERS v. REYNOLDS.

IN THE KING'S BENCH, NOVEMBER 14, 1831.

[Reported in 2 Barnewall & Adolphus, 882.]

Lord Tenterden
Assumpsit for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., at the Sittings in Middlesex after last Hilary Term, the agreement proved was as follows:—

John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stablekeeper, and delivered on his premises as above (i. e., at Long Acre, London), till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

(Signed)

JOSEPH WITHERS, JOHN REYNOLDS.

The straw was regularly sent in from the 20th of October, 1829, when this agreement was made, till the end of January, 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant 11l. 11s., being the price of all the straw delivered, except the last load, saying that he should always keep one load in hand. The defendant objected to this, but was at length obliged to take the sum offered; and he then told the plaintiff that he would send no more straw unless it was paid for on delivery; and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own showing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C. J., was of this opinion, but directed a verdict for the plaintiff, reserving the point. A rule *nisi* was afterwards obtained for entering a nonsuit.

Campbell and *R. V. Richards* now showed cause. Two things independent of each other were stipulated by this contract to be done by the respective parties; the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal

to pay for one load excused the defendant from any future performance of his contract. *Weaver v. Sessions*.¹ And, according to that case, he ought at least to have shown that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross-action, but has no defence to this.

Platt, contra. The only question is upon the construction of this agreement. It is true, no time of payment was specified, but, in the absence of any express stipulation, the money would be payable on demand as often as it became due; and here the words, "to pay thirty-three shillings per load for each load so delivered," intimate that the price of each load was to be due as soon as it was delivered. (Here he was stopped by the Court.)

LORD TENTERDEN, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether, upon the plaintiff's saying "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw: and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds that the plaintiff shall pay that sum "for each load of straw delivered on his premises" from the date of the agreement till the 24th of June, 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTON, J. If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract. *Rule absolute*

¹ 6 Taunt. 154.

in the case of the defendant's refusal to pay for the loads as delivered, the plaintiff is not liable for ceasing to perform his part of the contract.

OLIVER KANE ET AL. v. JOHN HOOD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 27, 1882.

[Reported in 13 Pickering, 281.]

ASSUMPSIT, brought by the executors of John Innis Clark. Trial before SHAW, C. J.

The plaintiffs rely upon an unsealed contract made by Clark and Hood, dated October 28, 1803, by which "it is mutually agreed that Hood is to have the land, &c. (describing certain land in Somerset) in consideration of which the said Hood is to pay the said Clark \$700, \$200 of which are to be paid in ten days, half the remainder in twelve months, and the other half in two years, from the above date, with the interest annually; and the deed to be executed at the completing of the last payment."

The two first instalments had been paid and received before the commencement of this action.

The plaintiffs neither allege nor prove that they ever made or tendered or offered any deed or conveyance of the land, but they aver that Clark, in his lifetime, and they, in their capacity of executors, since his decease, have always been ready to convey the land to Hood, and to execute to him a good and sufficient deed thereof, upon his complying with the terms of the contract on his part, and that they are here in court ready to execute such deed upon his complying with those terms.

The defendant contends that, the two first instalments being fully paid, the agreements of the parties, in respect to the last instalment, are mutually dependent and conditional, and neither is bound to perform without a tender of performance on the other side, to be made at the same time.

On the contrary, the plaintiffs contend that the promise of the defendant is independent, and that he was bound to pay at the time and conformably to the terms of the contract, in consideration of the engagement of Clark, without any tender of performance on the part of the plaintiffs.

The plaintiffs became nonsuit, subject to the opinion of the Court on the above question.

Cobb, for the plaintiffs, cited *Terry v. Duntz*, 2 H. Bl. 389; 1 Wms. Saund. 320, note 4; *Gardiner v. Corson*, 15 Mass. 500.

W. Baylies and *Battelle*, for the defendant, cited *Callonel v. Briggs*, 1 Salk. 112; *Thorpe v. Thorpe*, *ibid.* 171; *Jones v. Barkley*, 2 Doug. 684; *Goodisson v. Nunn*, 4 T. R. 761; *Glazebrook v. Woodrow*, 6 T. R. 366; *Phillips v. Fielding*, 2 H. Bl. 123; *Martin v. Smith*, 6 East, 555; *Johnson v. Reed*, 9 Mass. 78; *Cunningham v. Morrell*, 10 Johns. 203; *Couch v. Ingersoll*, 2 Pick. 292; *Dana v. King*

same as meeting

ibid. 155 ; *Hunt v. Livermore*, 5 Pick. 395 ; *Bean v. Atwater*, 4 Conn. 3 ; *Parker v. Parmele*, 20 Johns. 130.

SHAW, C. J., delivered the opinion of the Court. This is a contract not under seal, but the same rules govern the construction of it as those applicable to cases of covenant. The only question which would seem to be presented by the facts is, whether, in a contract between parties relative to the same subject-matter, some stipulations may be mutual and independent, and others dependent and mutually conditional ; and this question was settled in the case of *Couch v. Ingersoll*, 2 Pick. 292. Indeed, the point in question constituted distinctly the ground of decision in that case, because the plaintiff, without having tendered performance on his part, recovered on a breach of one covenant because it was independent, and failed on the other, because, upon the construction put upon it by the Court, it was independent.

In the present case, the two first instalments of the purchase-money were to be paid before the time fixed for the conveyance of the land, and therefore it is very clear they are independent. Had a suit been brought for either of them, no tender, offer, or averment of readiness, would have been necessary, and no defence could have been made. The obligation of the defendant to pay the money at the times stipulated was absolute and unconditional. But it is shown by the facts, that the two first instalments were fully paid ; and though payment was not made at the times fixed, yet it was afterwards accepted, and the plaintiffs affirmed the contract by suing on it. Then the question is, whether the payment of the last instalment on the one side, and the execution and tender of the deed, upon payment being made, on the other, were not dependent and conditional ; and we think they were. The words are, "and the other half in two years, with interest annually, and the deed to be executed at the completing of the last payment." Suppose the whole had been payable at once, instead of being payable by instalments, and the stipulation had been to pay seven hundred dollars in two years, the deed to be executed at the payment ; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional ? I think not. The intent of the parties is to govern. And what difference is there, whether the final payment is the whole or part, the remainder of the purchase-money having been paid and accepted ? Where the whole purchase-money is to be paid at once and the deed is to be then given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent in a title to the land purchased. The same reason applies to the last instalment. An obvious reason why the first and second instalments should be paid without having a deed is, that the vendor was to withhold the title as a security for the purchase-money, and the vendee was content to rely on the vendor's contract for his future title ; but no such reason applies to the final and complete payment of the purchase-money. Whether, therefore, we

consider the particular language of the contract, or the general intent of the parties, we think these parts of the contract were mutually dependent and conditional, and the plaintiffs cannot recover without averring performance or an offer to perform on their part.

Plaintiffs nonsuit.¹

ELLEN v. TOPP.

IN THE EXCHEQUER, APRIL 15, 1851.

[Reported in 6 Exchequer Reports, 424.]

See also 3rd note

COVENANT on an indenture of apprenticeship of the 21st of July, 1846, by the master against the father of the apprentice, the father being a party to the indenture. The material parts of this indenture (of which profert was made) were as follows: "This indenture witnesseth, that Richard Topp, an infant, of the age of sixteen years or thereabouts, by and with the consent of his father, George Topp, of, &c., farmer, doth put himself apprentice to Frederick Ellen, of, &c., auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve from the 1st day of July now last past unto the full end and term of five years from thence next following, to be fully complete and ended; during which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do." The indenture then proceeded to state that the apprentice should do no damage to his master, &c., and that he "shall not absent himself from his master's service day or night unlawfully, but in all things, as a faithful apprentice, he shall behave himself towards his said master and all his during the said term. And the said Frederick Ellen, in consideration of the sum of 70*l.* to him in hand paid by the said George Topp upon the execution of these pres-

¹ Bank of Columbia v. Hagner, 1 Pet. 455; Hill v. Grigsby, 35 Cal. 656; Sanford v. Cloud, 17 Fla. 532; Duncan v. Charles, 5 Ill. 561; Runkle v. Johnson, 30 Ill. 332; Headley v. Shaw, 39 Ill. 354; McCulloch v. Dawson, 1 Ind. 413; Summers v. Sleeth, 45 Ind. 598; Clark v. Continental Improvement Co., 57 Ind. 135; Berryhill v. Byington, 10 Iowa, 223; Courtright v. Deeds, 38 Iowa, 507; Wadlington v. Hill, 18 Miss. 560; Eckford v. Halbert, 30 Miss. 273; Robinson v. Harbour, 42 Miss. 795; Ackley v. Elwell, 5 Halsted, 304; Egbert v. Chew, 2 Green, N. J. L. 446; Shinn v. Roberts, 1 Spencer, 435; Johnson v. Wygant, 11 Wend. 48; Glenn v. Roseler, 156 N. Y. 161; Powell v. Dayton, &c. R. R. Co., 14 Oreg. 356, acc. See also Giles v. Giles, 9 Q. B. 164.

Weaver v. Childress, 3 Stew. (Ala.) 361; Hays v. Hall, 4 Port. 374, 387; White v. Beard, 5 Port. 94, 100; Miller v. Wild Cat Road Co., 52 Ind. 51; Clopton v. Bolton, 23 Miss. 78; McMath v. Johnson, 41 Miss. 439; Morris v. Sliter, 1 Denio, 59; Gale v. Best, 20 Wis. 44; Shenners v. Pritchard, 104 Wis. 287, *contra*. See also Loud v. Pomona Land Co., 153 U. S. 564; Gibson v. Newman, 2 Miss. 341.

See also 3rd note

in agreement in duplicate.

ents (the receipt whereof the said Frederick Ellen doth hereby acknowledge), doth hereby covenant and agree to and with the said George Topp, his executors and administrators, and also the said Richard Topp, that he, the said Frederick Ellen, his executors and administrators, his said apprentice in the art of an auctioneer, appraiser, and corn-factor, which he useth, by the best means that he can, shall teach, and instruct, or cause to be taught and instructed, finding unto the said apprentice sufficient meat, drink, and lodging, and other necessities during the said term, except wearing apparel, medical attendance, and pocket-money; and the said George Topp, for himself, his executors and administrators, doth hereby covenant and agree with the said Frederick Ellen, his executors and administrators, that he the said George Topp, his executors and administrators, shall and will find and provide his said son Richard Topp with wearing apparel, medical attendance, washing, and pocket-money, during the said term; and for the true performance of all and every the said covenants and agreements, either of the said parties bindeth himself unto the other by these presents." The declaration then stated, that the said Richard Topp afterwards, to wit, on the said 21st of July, 1846, entered and was then received into the service of the plaintiff as such apprentice as aforesaid, and continued in such service under and by virtue of the said indenture for a long space of time, to wit, from the day and year last aforesaid until and upon the 22d of July, 1849; and laid as a breach that the said Richard Topp did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof the said Richard Topp, during the said term of five years in the said indenture mentioned, to wit, on the said 22d of July, 1849, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture, and of the said covenant of the defendant in that behalf made as aforesaid, to the plaintiff's damage, &c.

The defendant, after setting out the indenture on oyer, pleaded that the plaintiff, at the time of the making of the said indenture as in the declaration mentioned, exercised the art and carried on the business of an auctioneer, appraiser, and corn-factor, as therein mentioned; and that the apprenticeship and covenants aforesaid were made with the plaintiff as such auctioneer, appraiser, and corn-factor, and not otherwise, and that, after the making of the said indenture, and before the accruing of the cause of action, &c., to wit, on, &c., the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned, and ceased to exercise and carry on, and hath not, at any time since, exercised and carried on the art and business of a corn-factor as aforesaid.

Verification.

Replication: That the plaintiff relinquished his business as a corn-factor aforesaid, with the full knowledge and consent of the defendant

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in that behalf; and that, from the time of such relinquishment continually until the accruing of the cause of action in the declaration mentioned, the said Richard Topp, with full knowledge of such relinquishment as aforesaid, continued, with the consent of the defendant in that behalf, to serve the plaintiff under the said indenture. Verification.

notes at bottom
Special demurrer to the replication, *inter alia*, on the grounds that the consent of the defendant to the relinquishment by the plaintiff of his business of a corn-factor aforesaid, and to the continuing of the said Richard Topp to serve the plaintiff as in the replication mentioned, is not alleged to have been given or contained by or in any deed or instrument under the seal of him the defendant, and that the contract in the declaration mentioned could not in law be varied or altered by parol, or by any consent other than a consent given or contained in some deed or instrument under seal; and that the replication is a departure from the declaration; that the contract relied upon in the declaration is a contract to employ and serve in the art and mystery of an auctioneer, appraiser, and corn-factor; and the replication sets up some new alleged contract to employ and serve in the art and mystery of an auctioneer and appraiser only.

Joinder in demurrer *argued as a matter of law*
The demurrer was argued in Easter Term last (April 26, 1850), before POLLOCK, C. B., PARKE, B., ROLFE, B., and PLATT, B., by *Macnamara* for the defendant, in support of the demurrer, and by *Taprell* for the plaintiff; and the Court took time to consider their judgment; but afterwards POLLOCK, C. B., said that, as a difference of opinion existed among certain members of the Court, they wished to hear the case re-argued. The case was accordingly re-argued in Hilary Term last (Jan. 20), before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B., by

Macnamara for the defendant in support of the demurrer.

Taprell, contra.

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. The breach assigned is, that the apprentice did not nor would faithfully serve the plaintiff according to the tenor and effect of the indenture; but on the contrary did on the 22d of July, 1849, unlawfully absent himself from the service of the plaintiff, and has henceforth continued absent from such service. [The Lord Chief Baron, after stating the pleadings, proceeded:] On the part of the plaintiff it was scarcely contended that the replication could be supported. It is obviously bad. Such parol consent cannot entitle the plaintiff to maintain an action of covenant in this form, which is founded entirely on the deed under seal.¹ The case therefore resolves

¹ But see *Thomason v. Dill*, 30 Ala. 444, 456; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508; *Blagborne v. Hunger*, 101 Mich. 375; *Stees v. Leonard*, 20 Minn. 494.

read

itself into the only question really argued before us, which was whether the plea was good. . . . The objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross-action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in *Boone v. Eyre*, and followed in *Campbell v. Jones* and other cases collected in the note to 1 Wms. Saund. 320 c. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should, therefore, be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes, and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of *Boone v. Eyre*, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us; but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the

benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro*, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will, therefore, be for the defendant.

*Judgment for the defendant.*¹

GRAVES v. LEGG AND ANOTHER.

IN THE EXCHEQUER, MAY 9, 1854.

[Reported in 9 Exchequer Reports, 709.]

THE declaration stated, that it was on the 19th of May, 1853, through Messrs. H. & R., brokers at Liverpool, agreed between the plaintiff and defendants in manner following, that is to say: the plaintiff then agreed to sell to the defendants, and the defendants to buy of the plaintiff, about 300 to 350 bales white washed Donskoy fleece wool, to arrive, at 10½d. per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all despatch, warranted fair average quality, but, should they prove otherwise, to be taken with a fair allowance, which it was mu-

¹ Compare the following apprenticeship cases. *Winstone v. Linn*, 1 B. & C. 460; *Wise v. Wilson*, 1 C. & K. 662; *Phillips v. Clift*, 4 H. & N. 168; *Raymond v. Minton*, L. R. 1 Ex. 244; *Learoyd v. Brook*, [1891] 1 Q. B. 431; *United States v. Scholfield*, 1 Cranch C. C. 255; *Gusty v. Diggs*, 2 Cranch C. C. 210; *Warner v. Smith*, 8 Conn. 14; *M'Grath v. Herndon*, 4 T. B. Mon. 480; *Powers v. Ware*, 2 Pick. 451; *Commonwealth v. Linker*, 8 Phila. 455; *Commonwealth v. Edwards*, 6 Binney, 203; *Commonwealth v. Deacon*, 6 S. & R. 526. Promises in other partly bilateral contracts were held dependent in *Allen v. Saunders*, 7 B. Mon. 593; *Jones v. Marsh*, 22 Vt. 144.

tually agreed between buyer and seller should be assessed by the said Messrs. H. & R. ; subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped ; customary allowances, payment, cash in fourteen days, less $1\frac{1}{2}$ per cent discount, from the date of finishing loading. Which agreement being made, afterwards the said wool, being 333 bales of wool of the quality and description in the said agreement mentioned, was, during the said month of August, old style, delivered, to wit, by the growers thereof at Odessa, to wit, to the agents of the plaintiff in that behalf, and was with all despatch then shipped there on board a certain vessel called the Science, which said vessel then sailed from Odessa with the said wool on board thereof, and afterwards, to wit, on the 22d of November, 1853, arrived at Liverpool with the said wool on board safe and in good condition, and according to the terms of the said contract ; and the plaintiff says, that the defendants have had notice of all the said premises, and that a reasonable time for the defendants to accept the said wools after the same arrived, and to fulfil their part of the contract, and pay for the said wools, has long since elapsed, and that he the plaintiff has at all times performed and fulfilled, and been ready and willing to perform and fulfil, all conditions precedent to his right to have the said wools accepted and paid for, and to his right to maintain this action. Yet the defendant would not at any time accept nor pay for the said wools, or any part thereof.

Plea : that the defendants agreed with the plaintiff to buy the said wool in the declaration mentioned, for the purpose of reselling the same in the way of their, the defendants', trade and business of wool-dealers, and thereby acquiring gains and profits. And further, that wool is an article that fluctuates greatly in price in the market ; and that the defendants could only resell the said wool as aforesaid when, and not before, the defendants had notice of the same being shipped, and when and not before the name of the vessel in which it was so shipped had been declared, according to the said contract in the declaration mentioned ; of all which premises the plaintiff, at the time of the making of the said agreement, had notice ; and further that, although the plaintiff had such notice, yet the plaintiff did not declare to the defendants, or either of them, the name of the vessel in which the said wool was shipped, or within the time at or within which he was by the agreement bound to declare the same, that is to say, as soon as such wool was so shipped, but omitted so to do and delayed and omitted so to declare the name of the said vessel in which the said wool was so shipped as in the said declaration mentioned, or to give the defendants any notice of the same being so shipped, for a long and unreasonable time after the same was so shipped ; and the defendants had not notice of the shipment of the said wool, or of the name of the vessel in which the same had been shipped, until after the expiration of a long and unreasonable time after the same had been so shipped, and after the plain-

tiff was bound and ought to have given and declared the same, and might and could have done so; and further, that between the time when the name of the said vessel ought to have been declared according to the said agreement in the said declaration mentioned, and the time when it was first declared to the defendants, or when they first had any notice of the said ship having sailed with the said wool on board thereof, the price of wool in the market had greatly fallen, and the said wool thence continually remained so fallen in price, and the same, when the name of the said vessel was first declared, and when the defendants first had notice or knowledge of the same having been so shipped, would sell or could be sold only for a much less sum of money than it would have done at the time when the plaintiff ought to and could have declared the name of the said vessel, or given the defendants such notice as aforesaid. Wherefore the defendants did not nor would accept or pay for the said wool, as in the said declaration mentioned.

Demurrer and joinder.

The case was argued in the present Term (May 3), by *Blackburn*, in support of the demurrer.

C. E. Pollock, contra.

The judgment of the Court was now delivered by

PARKER, B. The pleadings in this case are these (his lordship stated them, and proceeded): The question raised by these pleadings is whether the provision, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea.

This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea, that the wool was bought, with the knowledge of both parties, for the purpose of reselling it in the course of the defendants' business; that it is an article of fluctuating value, and not salable until the names of the vessels in which it was shipped should have been declared according to the contract.

The declaration having averred, according to the 57th section of the Common Law Procedure Act, the performance of conditions precedent generally, the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists. The loss which he avers to have sustained by that breach is immaterial. The only question is, whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject, in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a

covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and under the new, the denial of such performance would be bad; and the cases of *Campbell v. Jones* and *Boone v. Eyre*¹ are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320 d (and the Lord Chief Baron, in delivering the judgment of this Court in *Ellen v. Topp*, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in *Campbell v. Jones* or *Boone v. Eyre*, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent;² and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation that the names of the vessels should be stated as soon as the wools were shipped was originally a condition precedent, it is so still. No other benefit was taken under the contract itself, as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels; nor was any subsequently received by the acceptance of the goods or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross-action on the contract to declare the names. In the state of things on this record, the simple question is, whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much indeed as the shipping of the goods at Odessa, with all despatch, after the end of August. And with respect to the shipment itself, Mr. Blackburn

¹ 2 Black. Rep. 1312, 1315.

² See *White v. Beeton*, 7 H. & N. 42; *Kauffman v. Raeder*, 108 Fed. Rep. (C. C. A.) 171; *Keller v. Reynolds*, 12 Ind. App. 383; *Swobe v. New Omaha Electric Light*, 39 Neb. 586.

did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent.

The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance had they afterwards taken any benefit under the contract.

*Judgment for the defendants.*¹

OLLIVE v. BOOKER.

IN THE EXCHEQUER, NOVEMBER 13, 1847.

[*Reported in 1 Exchequer Reports, 416.*]

ASSUMPSIT to recover damages for breach of a contract of charter-party, which was in the following terms: "London, 24th December, 1844. Charter-party. It is this day mutually agreed between Messrs. Ollive, Nephew, & Co., original charterers of the good ship or vessel called the Dove, A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago, and Messrs. Booker & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Marseilles (after having delivered her cargo at Genoa for ship's account), or so near thereunto as she may safely get, and there load from the factors of the said charterers a full cargo of linseed or other goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth for orders, which are to be given in due course of post, or so near thereunto as she may get, and deliver the same on being paid freight at and after the rate of 5s. 6d. per imperial

¹ "The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent, or unimportant omissions or defects. A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to details that are unimportant. There must be no wilful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact." *Miller v. Benjamin*, 142 N. Y. 613, 617. Applications of this principle to cases where a partial breach was held fatal may be found in *Glazebrook v. Woodrow*, 8 T. R. 366; *H. D. Williams Cooperage Co. v. Schofield*, 115 Fed. Rep. (C. C. A.) 119; *Worthington v. Gwin*, 119 Ala. 44; *Leopold v. Salkey*, 89 Ill. 412; *Lake Shore, &c. Ry. Co. v. Richards*, 152 Ill. 59; *Ballance v. Vannuxem*, 191 Ill. 319; *Davis v. Jeffris*, 5 S. Dak. 352; *McLean v. Brown*, 15 Ont. 313, 16 Ont. App. 106.

quarter for linseed, or other goods in full proportion, according to the London printed rates delivered, the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted. The freight to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London at three months' date. Thirty working days are to be allowed, Sundays excepted, the said merchant (if the ship is not sooner despatched) for loading the said ship at Marseilles, and unloading at the return port; mats and bulkheads to be found by the charterers, and dunnage by the ship, and ——— days on demurrage, over and above the said laying days, at 4*l.* per day; the penalty for the non-performance of this agreement, 400*l.*; the vessel to be consigned to the freighters' agents at Marseilles; cash for usual disbursements at Marseilles, free of interest and commission but the insurance. Bills of lading to be signed for more or less freight, without prejudice to the charter-party. Per proc. Booker & Co., Thomas Booker, jun.; Ed. Ollive, Nephew, & Co.; John Aitkin, witness to the signature of Messrs. Booker & Co., and of Messrs. Ed. Ollive & Co. The commission on this charter-party is at 5*l.* per cent, due ship lost or not lost. The vessel to be addressed to Alexander Howden or his agents at the port of discharge."

The first count of the declaration, after setting forth the provisions of the charter-party, averred mutual promises, and performance on the part of the plaintiff, and assigned as a breach that "the defendant did not nor would, within the space of the said thirty working days in the said last-mentioned charter-party, ship a full cargo of linseed or other goods, according to the terms of the said last-mentioned charter-party, in or on board the said ship or vessel, according to the tenor and effect of the said last-mentioned charter-party and of his said promise aforesaid, but on the contrary the defendant both neglected," &c.

The eighth plea to the first count, after setting out the charter-party verbatim, proceeded as follows: And the defendant avers that upon the making of the said charter-party, time was an essential and material part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and essential part of the contract, to wit, with reference to the object of the said voyage and the distance of the said port of Marseilles, and the nature of the said intended cargo and the time of year at which the said charter-party was made. And the defendant further says, that in point of fact at the time of the making of the said charter-party the said vessel had not sailed three weeks before, but on the contrary had sailed at a materially and unreasonably later time, to wit, one week later, which the plaintiff at the time of the making of the said charter-party knew, and whereof the defendant had no notice or knowledge; wherefore the defendant wholly declined to accept or employ the said vessel under the said charter-party, to wit, immediately upon learning and

knowing that the said vessel had not sailed as in the said charter-party set forth, to wit, upon the 1st of February, 1845, and wholly neglected and refused to load any cargo on board her, to wit, upon the day and year last aforesaid, as he lawfully might for the cause aforesaid. Verification. Replication, *de injuria*.¹

At the trial, at the Sittings after last Hilary Term, before the Lord Chief Baron, a verdict was found for the plaintiff upon all the issues, except those raised by the eighth, ninth, and eleventh pleas, and upon these issues the defendant had a verdict; leave being reserved to the plaintiff to move to enter a verdict upon them also.

Crowder having obtained a rule *nisi* accordingly, and also for judgment *non obstante veredicto* upon the eighth plea.

~~Watson and Greenwood~~ now showed cause.

PARKE, B. I am of opinion that the rule for judgment *non obstante veredicto* on the eighth plea ought to be discharged. It seems to me that the averment in the plea, that at the time of entering into the charter-party the plaintiff knew that the vessel had sailed a materially and unreasonably later time than that which was stipulated for, is an immaterial averment, and might be struck out. The main question, however, in the construction of this plea, is, whether the allegation in the charter-party, of the vessel being "now at sea, having sailed three weeks ago," is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavor to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks; and, if time is of the essence of the contract, no doubt it is a warranty and not a representation. Such also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel. This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight. I entirely agree with the reasoning of Tindal, C. J., in the case of *Glaholm v. Hays*, which I think applies to the present case. There the stipulation was held to be a condition precedent. The defendant was entitled to say that he was not bound to load the vessel, as the condition had not been performed, and that the case was the same as if the vessel had not proved to be A 1, as she was warranted to be. I think, therefore, that the plea affords a good answer, and that the rule for judgment *non obstante veredicto* ought to be discharged.

ALDERSON, B. I am of the same opinion. The words which describe the ship as being A 1 amount to a warranty, and the statement that

¹ The statement of the pleadings has been materially abbreviated.

she had sailed for three weeks is equally so. The question, whether these words amount to a condition precedent has been decided by *Glaholm v. Hays*; the reasonings there are applicable to the present case. and I am unable to distinguish the two cases.

ROLFE, B. I am of the same opinion. The stipulation in the present case is not collateral matter, but is a part of the contract. I agree with the rest of the Court, that the case in the Common Pleas governs this. There the stipulation was that the vessel should sail, but that makes no difference. The condition was founded upon the object that she should load her cargo in a certain time; and if it had been that she should load in six weeks, that being the length of the voyage, that would be the same as a condition that she should load in the ordinary time, of which she had already been three weeks at sea. I think the case is governed by that in the Common Pleas, which is consistent with common sense and reason. The rule, therefore, for judgment *non obstante veredicto* must be discharged.

*Rule discharged.*¹

*Have this case explained.
15 min. later*

THOMPSON AND OTHERS v. GILLESPIE.

IN THE QUEEN'S BENCH, JUNE 1, 1855.

[Reported in 5 *Ellis & Blackburn*, 209.]

M. Rich 1/12

THE first count of the declaration alleged that a charter-party was made and entered into by and between plaintiffs and defendant, of which the following is a copy: LONDON, 14th October, 1854. — It is this day mutually agreed between Messrs. R. Thompson & Sons, own-

¹ See also *Glaholm v. Hayes*, 2 M. & G. 257; *Behn v. Burness*, 3 B. & S. 751; *Corkling v. Massey*, L. R. 8 C. P. 395; *Oppenheim v. Fraser*, 34 L. T. 524; *Bentsen v. Taylor*, [1893] 2 Q. B. 274; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40; *Deshon v. Fosdick*, 1 Woods, 286; *The Orsino*, 24 Fed. Rep. 918; *The March*, 25 Fed. Rep. 106; *Pedersen v. Pagenstecher*, 32 Fed. Rep. 841; *Gray v. Moore*, 37 Fed. Rep. 266; *The B. F. Bruce*, 50 Fed. Rep. 123; *Olsen v. Hunter-Benn*, 54 Fed. Rep. 530; *Holmes*, Common Law, 328. In *Behn v. Burness*, WILLIAMS, J., said: "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word. viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages." This test was approved in *Bentsen v. Taylor*.

ers of the good ship or vessel called the *Mary Graham*, whereof is master, of the measurement," &c., "now at Sunderland, and Thomas Gillespie, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, at Sunderland, load from the factors of the said merchant, in the customary manner and in regular turn, a full and complete cargo of Londonderry or Lambton's Wallsend coals, whichever is readiest; which the said merchant binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle," &c. "And, being so loaded, shall therewith proceed to Constantinople for orders, to deliver there, or Stenea or Beicos Bay, or at Varna, or a safe place in the Black Sea, or so near thereunto as she may safely get, and deliver the same, in her regular turn, into craft, steamer, or depot ship, at any wharf or pier where she may safely lie, as may be directed by the consignee, being paid freight on the quantity delivered in the manner after mentioned at the rate of 34*l.* per kiel of 21½ tons, if discharges at Constantinople, Stenea, or Beicos," &c. (other rates for a discharge elsewhere), "in full of all port charges, consulages, pilotages, Ramsgate and Dover dues; the act of God," &c., excepted. "The balance of freight to be paid by an approved bill on London, at three months' date from the production of the consignee's certificate of the right delivery of the cargo at as aforesaid, agreeably to bills of lading, or in cash equal thereto, at charterer's option." Then followed stipulations as to rate of unloading, running days for the same, and demurrage for excess; and other clauses not now material. "One-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less five per cent thereon for insurance, interest, and commission: penalty for non-performance of this agreement, the estimated amount of freight." Signed by defendant and plaintiffs. Averment: That the persons in the said charter-party mentioned and described as Messrs. R. Thompson & Sons, were and are plaintiffs, and that the person therein mentioned and described as Thomas Gillespie was and is defendant. That defendant caused the ship to be loaded with a full and complete cargo of coals, to wit, pursuant to the said charter-party; and that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party. That plaintiffs did, and were ready to do, all things necessary on their part, and that all things necessary happened and were done, to entitle plaintiffs, to wit, by their agent in London, to receive, and to render defendant liable to pay to their agent in London, the one-fourth part of the said freight, by the said charter-party agreed to be advanced to the plaintiff's agent in London on the ship having sailed, less 5*l.* per cent thereon for insurance and commission. That the said one-fourth part of the freight, less 5*l.* per cent as aforesaid, amounted to a large, &c., to wit, 214*l.* Yet defendant hath not paid the same, or any part thereof, to plaintiffs, or to their agent in London.

Second count, for money payable by defendant to plaintiffs for freight for the conveyance by plaintiffs for defendant, at his request:

of goods in ships; and for money found to be due from defendant to plaintiffs on accounts stated between them.

Pleas: 1. To the first count: That the said ship did not sail as alleged.

2. To the first count: That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that, by reason of the premises, the said ship and the said cargo of coals were wholly lost.

3. To the first count: That the plaintiffs not only wrongfully and negligently sent the said ship, so loaded as in the said first count mentioned, out to sea in an unseaworthy state, and without a proper and sufficient crew to navigate her on the said voyage, and when she was not fitted for the said voyage, and at a time when it was very dangerous for the said ship to proceed to sea; but the defendant says that, after the said ship had been so as aforesaid sent to sea, and while she was on the high seas near to the sea-shore, the plaintiffs wrongfully and negligently caused and permitted the master of the said ship to leave the said ship, and go ashore, and wrongfully and improperly caused and permitted the said ship to be left there, to wit, on the high seas, near to the sea-shore, for a great length of time, without a master, without a proper and sufficient crew to manage and navigate her: during which time the said ship, by reason of the premises, sunk and was wholly lost; and the said cargo of coals was also, by reason of the premises, wholly lost.

4. To the residue of the declaration: Never indebted.

The plaintiffs joined issue on all four pleas, and also demurred to the second and third.

Joinder in demurrer.

The demurrer was argued in last Easter Term.

Atherton, for the plaintiffs. As to the second plea. The question on this demurrer is not whether the facts there stated afford ground for an action by defendant against plaintiffs, but whether they constitute a defence in this action. Now the first averment, that the ship was not seaworthy at the commencement of the voyage, is no answer to an action for freight, inasmuch as whether seaworthy or not she might still perform the voyage and earn freight; and the rules applicable to an ordinary action for freight must be applicable to an action like this for a portion of the freight. But then does the additional averment that the ship was lost by reason of the unseaworthiness aid the defence? Where a defendant sets up damage to himself as an answer to a declaration, he must at least show clear damage on his side equivalent to the damage sustained by the plaintiff. "A cause of action against a plaintiff will be no bar to an action by him for avoiding circuity of action, when the recovery in both actions is not equal." Note (2) to *Turner v. Davies*.¹ [*Manisty*, who was for the defendant, mentioned *Charles v. Altin*.² *LORD CAMPBELL*, C. J. The litigation is not put as

¹ 2 Wms. Saund. 150 a.

² 15 Com. B. 46.

end so unless the damages are equivalent.] Here the damage sustained by the loss of the cargo might be greater or less than the freight. It might happen that the cargo, on arriving at Constantinople, from the state of the market or other circumstances, was not worth the freight. [ERLE, J. Suppose the contract to be, if I give you a straw you shall give me 1,000l.: the giving of the straw is a condition precedent to getting the 1,000l. I think that is the rule applied to such mutual contracts as this.] That would be to construe this charter-party as making the contract to pay the freight in advance dependent on the fulfilment of a warranty. There are three cases: first, where the act of one party is a condition precedent to his calling on the other to act; secondly, where there are simply mutual stipulations; thirdly, where the performance of the two acts is to be simultaneous. The utmost that can be said is, that this is a case of the third kind; but how can the right to the advance of freight be simultaneous with a right to have the use of the ship during the whole voyage which is to ensue? [ERLE, J. The case seems to me to fall within the class of simultaneous acts; and if the sailing were illusory, the plaintiff's right would not arise.] The defendant might raise that point on a traverse of the sailing. [LORD CAMPBELL, C. J. There is a great difficulty in resting the defence upon the ground of avoiding circuitry; but it is a question whether the freight was ever earned. ERLE, J. Suppose the owner of the cargo had said, "I insist on the ship not sailing, for she is not seaworthy." I do not think the actual loss makes any difference.] Suppose the vessel to have sailed on the 1st of January, and not to have been lost till the 1st of March; would not the plaintiffs be entitled to recover the advanced freight? [ERLE, J. I am not prepared to answer in the affirmative: the loss is only evidence of the unseaworthiness.] According to that, the slightest want of completeness would be an answer? [ERLE, J. The question may be as to a substantial non-performance, as illustrated by the language of Lord Ellenborough in *Havelock v. Geddes*.¹ The condition precedent seems to be here a complex idea; the ship is to sail, being staunch, &c.] Suppose the action to have been brought the day after the ship had sailed, and the plea to have been that she did not sail, being staunch, &c., throwing the loss out of the question. [CROMPTON, J. There is an old case in *Showers*² which seems to show that where freight is advanced, if the ship be afterwards lost, the freighters cannot have their money back.]

The third plea shows only neglect subsequent to the vesting of the right of action. That, at the utmost, can be ground only for a cross-action.

Manisty, contra. As to the second plea. The contract was that the ship should sail in a state reasonably fit for the voyage. The quarter of the freight was to be advanced, subject to a deduction in respect of the insurance, interest, and commission, which would fall on the defend-

¹ See *Graves v. Legg*, 9 Exch. 709, 716.

² Probably the Anonymous Case in 2 Show. 282.

ant. But the insurance would be worthless unless the ship was seaworthy when she sailed. [LORD CAMPBELL, C. J. It has been held that an advance like this may be insured under the name of freight, though it is not strictly freight.¹ You suggest that the contract contemplates the defendant's keeping up a contract of insurance.] Yes: the deduction is partly for the purpose of enabling the defendant to insure. [LORD CAMPBELL, C. J. Or to stand as his own insurer.] That would be the same thing, so far as relates to the construction of the contract. (The contract therefore must be understood to contain a warranty by the plaintiffs that the ship would sail in a proper state.) [ERLE, J. Perhaps, according to a distinction which has been drawn, it is not so much a warranty as an element of the contract.] Even in the case of an action for the price of goods sold, it is competent to show that there is nothing recoverable because of the breach of a warranty. If it be necessary to inquire whether the plea is good for prevention of circuity of action, it is to be observed that *Charles v. Altin* is distinguishable. It was there held that a plea, in order to show a defence by way of avoiding circuity of action, must show that the cross-claim was for the same sum as that which the plaintiff demands. But that is so here; for the loss of the quarter freight to the defendant is that which the plaintiff, in respect of the identical contract, would have to make good in an action for sailing with the ship in an unseaworthy state; and to make two cross-actions necessary for the adjustment of this claim would be to incur what Lord Denman, in *Walmesley v. Cooper*,² calls "the scandal and absurdity of allowing A. to recover against B. in one action, the identical sum which B. has a right to recover in another against A." That something additional might be recovered in the cross-action can make no difference. [CROMPTON, J. What you would recover in the cross-action would be the value of the goods.] The jury would be bound to give the amount of the loss accruing from the payment of the quarter freight. [LORD CAMPBELL, C. J. That comes to a case of unliquidated damages; where the circuity of action principle applies, the cross-demand ordinarily sounds in debt.] Not invariably, as in the case of a covenant not to sue, or a contract to indemnify. [LORD CAMPBELL, C. J. It is certainly a reproach to our procedure that we cannot, as is done in other countries, always bring cross-demands to be settled at once.] *Connop v. Levy*³ furnishes a good instance of the defence which a contract to indemnify supplies.

The principle of avoiding circuity of action applies to the third plea as well as to the second.

Atherton, in reply. The amount sought by the plaintiff here possibly might, but need not necessarily, be the same as that which the defendant would recover in a cross-action. Where that is so, the principle of avoiding circuity does not apply. As to the other point, the sailing in a proper condition was not a condition precedent, but was the subject

¹ See *Hall v. Janson*, 4 E. & B. 500, 509.

² 11 A. & E. 216, 221, 222.

11 Q. B. 769

of a mutual stipulation: the quarter freight, if it had been paid on the ship sailing, could not have been recovered back on its being discovered, before the loss of the ship was known, that she had sailed in an unseaworthy state. The only argument that can be raised from the deduction in respect of insurance is, that both parties took for granted that the ship would be seaworthy at the time of sailing; but that does not make the seaworthiness a condition precedent. The sailing is a condition precedent, but not the sailing in any particular state of fitness.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the Court.

This was an action by the owners of a ship on a charter-party, whereby it was agreed between them and the defendant that the ship, being tight, staunch, and strong, and every way fitted for the voyage, should at Sunderland load from the factors of the defendant a full cargo of coals, and, being so loaded, should therewith proceed to Constantinople for orders, and deliver the cargo there or at some port in the Black Sea, being paid freight on the quantity delivered at certain stipulated rates: "one-fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed, less 5 per cent thereon for insurance, interest, and commission." The declaration alleged that the defendant caused the ship to be loaded with a cargo of coals, and "that the said ship, being so loaded, sailed, to wit, for Constantinople, pursuant to the said charter-party;" and that, although the plaintiffs had done every thing to entitle them to an advance of one-fourth of the freight, amounting to 214*l.*, the defendant had not paid the same or any part thereof to their agent in London.

The second plea was, "That the said ship was not, at the commencement of the said voyage, tight, staunch, and strong, and every way fitted for the voyage; and that by reason of the premises, the said ship and the said cargo of coals were wholly lost." To this plea there was a demurrer.

Upon the argument before us, in last Easter Term, the doctrine of circuity of action was relied upon. But we do not think it applicable, for the reasons stated in *Charles v. Altin*. We are of opinion, however, that this plea is a bar to the action, on the ground that it shows that the advance of freight had never become payable.

Freight, generally speaking, is not payable till the goods have been delivered at the port of destination. Here, by special stipulation, one-quarter of the amount was to be paid in advance on a certain event, viz., the ship having sailed from Sunderland for Constantinople, in pursuance of the charter-party. The charter-party required that when she sailed, she should be "tight, staunch, and strong, and every way fitted for the voyage." If she sailed on the voyage in a seaworthy condition, the merchant was to advance one-fourth of the freight, which he could not recover back if the ship, having so sailed, should afterwards be lost by the perils of the sea without having delivered any part

of her cargo. *Pro tanto* the risk was transferred from the shipowners to the merchant; and the arrangement between them was that the amount to be advanced was to be insured by him, as appears clearly from the deduction of 5 per cent for insurance, interest, and commission. By a policy of insurance, the merchant was to be indemnified to the extent of the sum he was to advance. But he could not have the benefit of this indemnity unless, at the commencement of the voyage, the ship was seaworthy. He must be considered to have promised to pay one-fourth of the freight in advance, if, when the ship sailed, she was in such a condition as that a policy of insurance on the freight would attach, and enable him to recover the money back in case of a subsequent loss. But the plea avers that the ship was not seaworthy at the commencement of the voyage, and that, by her unseaworthiness, the cargo of coals was wholly lost. It was argued, for the plaintiff, that the loss after the sailing is for this purpose immaterial, and that, although unseaworthy when she sailed, she might have completed the voyage and delivered the cargo in safety. In that case the full freight certainly would have been earned, and would have been payable: but still the conjuncture never would have arisen upon which a part of the freight was to be paid in advance. For these reasons we think that the second plea is sufficient.

There is a third plea, upon which, as it is demurred to, we are bound to give our opinion. This plea has some introductory observations about the ship having been sent to sea in an unseaworthy state, but it contains no allegation to that effect, and we consider the substance and gist of the plea to be that, after the ship sailed and while she was on the high seas, the plaintiffs were guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were wholly lost. This plea, we think, is bad, as it admits that the ship sailed on the voyage from Sunderland in pursuance of the charter-party. If this be true, one-fourth of the freight thereupon became payable in advance; and any subsequent default or misconduct of the plaintiffs would only be the subject of a cross-action.

*Judgment for defendant on the second plea; for the plaintiffs on the third.*¹

¹ See *Work v. Leathers*, 97 U. S. 379; *Strong v. United States*, 154 U. S. 632; *The Giles Loring*, 48 Fed. Rep. 463; *The Director*, 34 Fed. Rep. 57.

Leading

POUSSARD v. SPIERS AND POND.

IN THE HIGH COURT OF JUSTICE, APRIL 25, 1876.

[Reported in 1 *Queen's Bench Division*, 410.]

DECLARATION ON AN AGREEMENT by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach: that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas Sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for 83*l*.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

Feb. 21. *Percy Gye*, for the plaintiff, cited *Cuckson v. Stones*,¹ *Simpson v. Crippin*, *Tilley v. Thomas*.²

Perry, Serjt., (with him *F. H. Lewis*), for the defendants, cited *Bettini v. Gye*, and *Graves v. Legg*. *Our. adv. vult.*

April 25. The judgment of the Court (Blackburn, Quain, and Field, JJ.) was delivered by

BLACKBURN, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter:—

CRITERION THEATRE, Oct. 16th. 1874.

TO MADAME POUSSARD.

(On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:

You to play the part of Friquette in Lecocq's opera of *Les Prés Saint Gervais*, commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (11*l*.), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then,

¹ 1 E. & E. 248.

² Law Rep. 3 Ch. Ap. 61

at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre.

E. P. HINGSTON, Manager.

Ratified:

SPIERS & POND.

MADAME POUSSARD, 46, Gunter Grove, Chelsea.

The first performance of the piece was announced for Saturday, the 28th of November. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, the 23d of November, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston, had procured, or would procure, a temporary substitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent, if there was one.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions.

There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (the 25th of November), the possibility that Madame Poussard might be prevented by illness

from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till the 25th of December, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labor was thrown away, Miss Lewis was to have a douceur for her trouble. If Miss Lewis was called on to perform, she was to be engaged at 15*l.* a week up to the 25th of December, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, the 25th of December. The piece proved a success, and in fact ran for more than three months.

On Thursday, the 4th of December, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On the 2d of January Madame Poussard left England.

My brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And, 5, Was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable? To which the jury said, "Yes." Lastly, he left the question of damages, which the jury assessed at 83*l.*

On these answers he reserved leave to the plaintiff to move to enter judgment for 83*l.*

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal, female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able

to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port, and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson v. Union Marine Insurance Co.*¹

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, show a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shown that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher

¹ Law Rep. 10 C. P. at p. 141. See *Storer v. Gordon*, 3 M. & S. 309.

pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favor of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide any thing on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.¹

BETTINI v. GYE.

IN THE HIGH COURT OF JUSTICE, JANUARY 25, 1876.

[Reported in 1 Queen's Bench Division, 183.]

THIRD count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant, in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows:—

Royal Italian Opera,
Covent Garden, London.

Year 1875.

The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing-rooms, both public and private, in Great Britain and in Ireland, during the period of his engagement with Mr. Gye.

¹ *Greene v. Linton*, 7 Porter, 133; *Giohan v. Dailey's Adm.*, 4 Ala. 336; *Remy v. Olds*, 34 Pac. Rep. (Cal.) 216; *Hickman v. Rayl*, 55 Ind. 551; *Camors v. Union Marine Ins. Co.*, 104 La. 349; *Johnson v. Walker*, 155 Mass. 253; *Powell v. Newell*, 59 Minn. 406; *Hubbard v. Belden*, 27 Vt. 645; *Green v. Gilbert*, 21 Wis. 395, *acc.*; *Asplund v. Mattson*, 15 Wash. 328, *contra*. Temporary illness of an employee, which does not go to the root of the contract, will not prevent him from enforcing the contract. *Cuckson v. Stones*, 1 E. & E. 248; *Warren v. Whittingham*, 18 T. L. R. 508; *Ryan v. Dayton*, 25 Conn. 191. Or wrongful but slight default. *Fillieal v. Armstrong*, 7 Ad. & E. 557.

11. merely question of law for court - facts - jury.

2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 18th of July, 1875.

3. The salary of Mr. Bettini shall be 150*l.* per month, to be paid monthly.

4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters, according to the ordinary usage of theatres.

6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, &c.

7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

F. GYE, Milan, 14 Dec. 1874.

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damaged.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of

his said engagement, for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so; wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

1875. Dec. 15. *Murphy, Q. C.* (with him *A. L. Smith*), for the plaintiff, in support of the demurrer, contended that the stipulation as to the attendance of the plaintiff at rehearsals six days before the commencement of the engagement was not a condition precedent, inasmuch as the plaintiff was to sing during the engagement at concerts as well as in operas; moreover, the plaintiff was not to sing in London from the 1st of January, and he had abstained from doing so. He cited *Robinson v. Davidson*,¹ and *MacAndrew v. Chapple*.

Arthur Wilson (with him *Percy Gye*) for the defendant, contended that the stipulation was a condition precedent. He cited *Atkinson v. Bell*,² *Graves v. Legg*, *Bradford v. Williams*, *Tilley v. Thomas*,³ *Jackson v. Union Marine Insurance Company*.⁴

Murphy, Q. C., in reply.

Cur. adv. vult.

1876. Jan. 25. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in *Graves v. Legg*, "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the Court must look at the general nature of such an engagement. By the 7th paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." The engagement was to begin on the 30th of March, 1875. It is admitted on the record that the plaintiff did not arrive in London till the 28th of March, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable for not doing so, but whether his fail-

¹ Law Rep. 6 Ex. 269.

² Law Rep. 3 Ch. 61.

³ 8 B. & C. 277, 283.

⁴ Law Rep. 10 C. P. 125.

considering the fact that the plaintiff was not in London at the time of the engagement, the court should find in favour of the plaintiff.

ure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised; and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams' Notes to Saunders, p. 554, in the notes to *Pordage v. Cole*, and in the second volume, p. 742, notes to *Peeters v. Opie*.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the 7th paragraph of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time, Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing rooms, both public and private, from the 30th of March to the 13th of July, 1875, and that he was to sing in

concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning any thing in London from the 1st of January to the 30th of March; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And, as far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts, for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must, therefore, we think, seek redress by a cross-claim for damages.

Judgment must be given for the plaintiff.

Judgment for the plaintiff.

EDWARD H. WELLS v. WILLIAM CALNAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 1, 1871.

[Reported in 107 Massachusetts Reports, 514.]

CONTRACT on a written agreement dated December 22, 1868, by which the plaintiff agreed to sell and the defendant to buy "the farm now occupied by" the plaintiff "and his father," (describing it by metes and bounds), for \$3,250, which the defendant agreed to pay on April 10, 1869, and it was provided that "no wood should be cut and removed from the premises save firewood for use in the house," that the plaintiff on receiving payment should execute and deliver to the defendant a proper deed for the conveying and assuring to him of "the fee simple of the said premises," and that for the due performance of the agreement, each party was bound to the other in the sum of \$500, "which said sum is to be taken as liquidated damages." The declaration alleged the making of the agreement, and that the plaintiff executed a good and proper deed for conveying and assuring to the

defendant in fee simple "the premises described in said agreement," and tendered said deed to the defendant on April 10, 1869, and demanded payment of the \$3,250 of the defendant, but that the defendant refused to pay the same, and also refused to pay the \$500 as liquidated damages; and that the defendant owed the plaintiff \$500. The answer admitted the making of the agreement, but denied the making or tender of a good and sufficient deed, and all the other allegations of the declaration.

At the trial in the Superior Court, before *Pitman*, J., it appeared that the plaintiff tendered a deed in due form on April 10, 1869; that the farm-house and out-buildings on the land were burned on the preceding day; that the defendant for that reason refused to accept the deed or pay the price; that the estate at the time of the contract was worth at least \$3,250, but after the fire was worth not more than \$2,000; and that the plaintiff had obtained insurance upon the buildings in the sum of \$2,000; and had received of the insurance company, in settlement of his claim against them, the sum of \$1,600.

The defendant offered to show that the insurance company, before the commencement of this action, offered the plaintiff to take from him a quitclaim deed of the estate, and pay him the full contract price. But the judge excluded the evidence as immaterial.

The plaintiff contended that he was entitled to the \$500 as liquidated damages, while the defendant contended that it was to be treated as a penal sum. But the judge ruled "that this question was of no importance, because, if the plaintiff was entitled to demand payment of the contract price notwithstanding the loss of the buildings, he had sustained damage to a larger amount by the defendant's refusal."

The defendant requested the court to instruct the jury that they might consider the amount received by the plaintiff from the insurance company in their estimate of his damages, and might return a verdict for nominal damages only; but the judge instructed them to the contrary.

The jury returned a verdict for the plaintiff in the sum of \$546.83, being the amount claimed, with interest; and the case was reported to this Court; if error appeared in the rulings, the verdict to be set aside and a new trial had; otherwise, judgment to be entered on the verdict.

W. G. Bates, for the defendant.

H. Morris & N. T. Leonard, for the plaintiff.

GRAY, J. The principles of law, upon which the rights of the parties to this case depend, appear to have been overlooked at the trial.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money.

For these reasons, in *Thompson v. Gould*, 20 Pick. 134, where, after the making of an oral agreement for the sale and purchase of a house and land, and the purchaser's entry into possession and payment of part of the price, but before delivery or tender of the deed, the house was destroyed by fire, it was held by this Court, in an elaborate judgment delivered by Mr. Justice Wilde, that he was entitled to recover back the money paid, on the ground of a failure of the consideration.

In *Bacon v. Simpson*, 3 M. & W. 78, the plaintiff had agreed to sell, and the defendant to purchase, a lease for years of a dwelling-house at a certain price, and the furniture, tenant's fixtures, and other property therein at a valuation to be made by appraisers. Before fulfilment of the agreement, or delivery of possession to the defendant, the greater part of the house and the property therein was consumed by fire. The plaintiff brought an action on the agreement, averring readiness to perform from the time of making the agreement and ever since, which was traversed by the defendant. It was held by the Court of Exchequer that by reason of the fire the plaintiff could not perform the agreement, and therefore could not maintain the action.

In *Taylor v. Caldwell*, 3 B. & S. 826, by a written contract one party agreed to give the other the use of a certain music hall on four specified days, for the purpose of holding concerts, with no express stipulation for the event of its destruction by fire. The Court of Queen's Bench held that upon the destruction of the building on an earlier day, by an accidental fire, both parties were excused from the performance of the contract; and, while recognizing as undoubted the rule that one who makes a positive contract to do a thing not in itself unlawful must perform it or pay damages for not doing so, declared it to be also well settled that that rule is only applicable where the contract is positive and absolute, and not subject to any condition, express or implied; and that where, from the nature of the contract, it appears that the parties must from the beginning have contemplated the continuing existence of some particular specified thing as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the accidental perishing of the thing without the fault of either party.

The doctrine as there stated has been approved in the later English cases. *Appleby v. Meyers*, Law Rep. 1 C. P. 615; s. c. Law Rep. 2 C. P. 651; *Boast v. Firth*, Law Rep. 4 C. P. 1; *Robinson v. Davison*, Law Rep. 6 Exch. 269. And it is illustrated by the previous decisions of this Court, by which it has been held that a person who agrees to build a house on the land of another is not discharged by the destruction of the house by fire before its completion; but that, where one agrees to repair another's house already built, such destruction of the house puts an end to the contract. *Adams v. Nichols*, 19 Pick. 275; *Lord v. Wheeler*, 1 Gray, 282.

In the present case, the agreement between the parties manifestly contemplates the conveyance of the buildings already upon the land as an important part of the subject-matter of the contract. It describes the property to be conveyed as the farm occupied by the vendor and his father, and contains a provision that until the day appointed for the delivery of the deed no wood shall be cut and removed from the premises, save firewood for use in the house. The vendor agrees to execute and deliver a proper deed for the conveying and assuring to the purchaser of the fee-simple "of the said premises." The price stipulated to be paid is an entire sum; and the report states that it appeared in evidence at the trial that the estate at the time of the contract was worth at least that sum, and after the fire was not worth two-thirds as much.

The case differs from those in which a lessee is held liable to pay rent or make repairs according to his covenants, notwithstanding the destruction of the buildings by fire or other accident during the term. There the lessor, by the execution and delivery of the lease, has fully performed the contract on his part; and the lessee, having thereby become the owner of the leasehold interest, must bear the same risk of fire or casualty as any other owner of property, and is not excused from performing his own express covenants. *Fowler v. Bott*, 6 Mass. 63; *Kramer v. Cook*, 7 Gray, 550; *Leavitt v. Fletcher*, 10 Allen, 119. But in the case at bar the defendant has only agreed to pay the purchase-money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land; and, the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not and could not tender such a conveyance as he had agreed to make or as the defendant was bound to accept, and was not therefore entitled to maintain any action against the defendant upon the agreement.

It was contended at the argument that this defence was not open under the pleadings. But the declaration alleges that the plaintiff tendered to the defendant a good and proper deed for the conveying and assuring to the defendant the premises described in the agreement; and this allegation is met by a direct denial in the answer.

The result is, that the rulings of the Superior Court were erroneous, because inapplicable to the case; that there has been a mistrial, and that the

*Verdict must be set aside, and a new trial had.*¹

¹ The authorities are collected in Ames's Cas. Eq. Jur. I. 227-238. The doctrine of the Civil Law is discussed in 9 Harv. L. Rev. 72. See also Bürg. Gesetzbuch, § 446; Titze, Unmöglichkeit, 255-264; Coviello, Caso Fortuito, 137 et seq.; 240 et seq.

JOHN W. PEAD v. LARKIN T. TRULL, ADMINISTRATOR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 1-MAY 19, 1899.

[Reported in 173 Massachusetts, 450.]

HOLMES, J. This is an action of contract upon an indenture by which, in consideration of the plaintiff Pead's covenant, Whitman covenanted to convey certain land to Pead within forty-five days, and Pead, in consideration of Whitman's covenant, covenanted to convey certain land to Whitman within forty-five days, and further covenanted to pay him fifteen hundred dollars upon receiving a deed of Whitman's land; and to give Whitman a note for three thousand dollars secured by second mortgage on the Whitman land and to assume and pay a first mortgage with interest from the date of the conveyance to him. Then followed mutual covenants to pay five hundred dollars as indemnity and liquidated damages in case of failure to perform the agreement. Before the forty-five days elapsed Whitman died, and on the last day, no administrator having been appointed, the plaintiff, to save his rights, tendered performance on his side to the widow of Whitman and to the defendant Trull, who had been Whitman's attorney in other matters and who afterwards was appointed administrator, but, apart from other technical difficulties, the deed tendered by the plaintiff ran to Whitman, the dead man.

It appears to us that the covenants ought to be construed as mutually dependent. There is some little suggestion of independence to be drawn from them, but nothing on the whole strong enough to overcome the presumption that in an exchange performance on the two sides is to be concurrent. *Goodisson v. Nunn*, 4 T. R. 461.¹ In actions upon such covenants the plaintiff must show performance on his side, or readiness to perform, and a refusal by the other party. *Brown v. Davis*, 138 Mass. 458; *Hapgood v. Shaw*, 105 Mass. 276, 279; *Smith v. Boston & Maine Railroad*, 6 Allen, 262, 273. But in a case like the present, under our statutes the administrator was the natural and proper person to perform the contract, as he was the one to receive the money from the plaintiff. Pub. Sts. c. 142, § 1. It was impossible to demand performance of him, or to offer it to him within the forty-five days, and therefore the plaintiff was not in default for not having done so, and the contract was not discharged at the end of that time. Of course the contract was not discharged by the death of a party.

The plaintiff's tender, although defective as such, is evidence that he was ready and willing to perform and that the administrator knew that he was. But it did not put the administrator in default. All that appears is that the latter has not caused the land to be conveyed to the plaintiff. It does not appear that he ever has repudiated the agreement. On the other hand, it does not appear that the plaintiff ever has

¹ *Summers v. Sleeth*, 45 Ind. 598, acc.

renewed his offer since the administrator was appointed. Assuming as we do that the plaintiff had a right to demand performance within a reasonable time after the appointment of an administrator, it does not appear that the judge has not found that he suffered more than a reasonable time to elapse, and so lost his rights. We are compelled by the terms of the report to direct a judgment on the finding. If in fact the finding was based solely on the ground that the plaintiff had lost his rights at the end of forty-five days, that ground is insufficient, and the rescript of this court will not prevent an application to the judge who heard the case to reopen the cause, or to enter what judgment he deems proper under this decision. *Platt v. Justices of the Superior Court*, 124 Mass. 353, 355; *Kenerson v. Colgan*, 164 Mass. 166.

*Judgment on the finding.*¹

NATIONAL MACHINE AND TOOL COMPANY v. STANDARD SHOE MACHINERY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 21, 1901-
MAY 19, 1902.

[Reported in 181 *Massachusetts*, 275.]

HOLMES, C. J. This is an action of contract upon one or two small claims and for the breach of a contract made in March, 1900, by certain letters, in which the plaintiff undertook to manufacture certain portions of a patented machine, according to a schedule attached to the defendant's order. This last is the main source of trouble. With regard to payment the plaintiff wrote: "If you should favor us with an order for a considerable number of these parts, we would bill them up to you as they were finished, and would merely ask that the bills be settled promptly as they came to you." At a later stage of the negotiation the plaintiff wrote that it should expect the defendant "to arrange it so that the bills would be approved promptly, and payment made on same at once, so that we may expect payments coming in rapidly after we have got well started on the contract, thus preventing us from having too large an amount of money tied up in the work." In this letter the plaintiff also wrote that it expected the defendant "to fully protect us from any suits that might be brought against us while we are on this work, on account of patents." It is denied that this letter was a part of the contract. We see no sufficient reason for the denial.

About May 1, 1900, the plaintiff was sued and demanded a bond

¹ It is often said, in contrasting the procedure of law and equity, that in actions at law time is always of the essence, whereas equity frequently grants specific performance in spite of delay. See Ames's *Case. Eq. Jur.* 327-341.

1 + March 1900
 significant violation of contract

with surety, as protection under its agreement. The defendant agreed to give a bond, but on May 21 declined to furnish a surety, and this is relied on by the plaintiff as one breach of the defendant's undertaking. We think it so plain that the defendant was not bound to give a surety that we dismiss this part of the case without further mention.

On May 17, 1900, the plaintiff having finished one item on the defendant's order, of sixty adjusting screws, sent a bill for the price, \$90. The bill bore a stamped notice that "all claims for corrections in this bill must be made within ten days from date." It was understood by the plaintiff that if the bill was approved by the proper man it would be sent on to New York to be paid. Three or four days later there was a conversation in the defendant's Boston office, it was suggested that this bill ought to be paid immediately on presentation, and complaint was made with regard to another overdue account of nearly seven hundred dollars (\$697.23). There were apologies and further delays, complaints, and explanations, the defendant's representative always explaining the delay as accidental, and finally, on May 28, stating that the check was ready but had been retained for entry as the bookkeeper was away. This last seems to have been true. On May 29 the plaintiff, hearing that a check had not come on, notified the defendant that "as you have not lived up to your agreement with us in relation to the work we are doing for you, we shall stop all of your work to-day," and stopped. Later efforts to come to an understanding failed.

The plaintiff when it stopped work had finished another small item of \$24, and on May 31 offered to deliver these goods as well as those for which the bill for \$90 had been sent, but the defendant declined to receive them. May 31 was the date of the writ, and the plaintiff very candidly says that the offer was made after suit was brought. The plaintiff seeks to recover as damages for the defendant's alleged breach the cost of the finished parts, and also the value of stock and castings and a large amount of work upon parts never delivered or completed.

The case was sent to an auditor. He found that the defendant did not repudiate the contract, and that the delay in payment did not justify the plaintiff in stopping work. The judge of the Superior Court adopted his rulings and findings, although finding in addition that the provision for prompt payment of bills for finished work was material, and that payment was not made promptly, and expressing a doubt whether the plaintiff was not justified in refusing to proceed.

Although the contract was not repudiated by the defendant, we are of opinion, notwithstanding *Winchester v. Newton*, 2 Allen, 492, which perhaps was not intended to establish a different general rule (see also *Newton v. Winchester*, 16 Gray, 208), that there might have been such a breach by failure to pay, as, however honest and however little it expressed a repudiation, would warrant a refusal to go on with the work. *Bloomer v. Bernstein*, L. R. 9 C. P. 588. See *Stephenson v. Cady*, 117 Mass. 6. There is nothing to the contrary in *Daley v.*

People's Building, Loan & Saving Association, 178 Mass. 13, 18. What is said there refers to an attempt to avoid a contract *ab initio* for a refusal to pay money due upon an executed consideration, when to make that payment is all that remains to be done on that side.

We may say further that for the purposes of this decision it is not necessary to consider Lord Selborne's somewhat sweeping suggestion in *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, 439, that when delivery of an instalment of goods under an entire contract is to precede payment for the goods delivered, as payment cannot be a condition precedent of the entire contract, it cannot be a condition precedent to the deliveries remaining to be made, at least without express words. See *Norrington v. Wright*, 115 U. S. 188, 210. In this case both parties have assumed that the plaintiff could put the defendant in default without delivery merely by sending a bill for an item when it was finished, so that Lord Selborne's logical difficulty, if there is anything in it, does not apply.

The question before us therefore is whether the defendant's failure to pay \$90 promptly was a breach going to the root of the contract, — a breach so important as to warrant the plaintiff in refusing to go on without defeating his own right to recover upon it or rescinding the contract. My Brother Loring and I have not been able to reach a clear conviction that it was such a breach, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment (see *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382; *Parker v. Middlesex Mut. Ass. Co.*, 179 Mass. 528, 531), the shortness of the delay, and some other circumstances. Of course not every trifling breach of contract excuses the other side from further performance. *Honck v. Muller*, 7 Q. B. D. 92, 100; *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, 444; *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. 285, 289; *Wright v. Haskell*, 45 Maine, 489, 492; *Weintz v. Hafner*, 78 Ill. 27, 29; *Worthington v. Gwin*, 119 Ala. 44, 54.

But my brethren are of opinion, and I dare say wisely, upon the findings, that the plaintiff was warranted in its course. The plaintiff's contract necessitated a considerable preliminary outlay, and would necessitate further expenditures in carrying out its part. At the time it was paying nearly seventy dollars a day. Prompt payment for goods as finished took the place of payments on account. The plaintiff was sensitive, and had a right to be so, at any appearance of uncertainty as to the stipulated payments being made. It had a further ground of anxiety in the suits brought against it for infringement of patents, when it had only the defendant's personal guaranty to protect it. Under such circumstances, the failure to pay the other bill for nearly seven hundred dollars, gave a character to the failure to pay the smaller sum which was due, and imparted a significance to the delay that otherwise it might not have had. A failure to pay a small sum promptly because of difficulty in raising the money is not the same

The question before us is whether the defendant's failure to pay \$90 promptly was a breach going to the root of the contract.

thing as, and may have a greater effect than, a similar failure simply because of the absence of a bookkeeper or of some misunderstanding between the defendant's Boston and New York houses.

The first count was upon a claim for \$209.38 outside the contract thus far discussed. The auditor finds for the plaintiff, but for \$129.15 only. The plaintiff demands the larger sum, notwithstanding the finding, on the ground that when seeking to reduce the plaintiff's attachment the defendant expressed a willingness to pay for all work that had been completed, that the plaintiff's counsel stated what that work amounted to so far as he knew, that thereupon the judge made an order dissolving the attachment upon the payment of that amount to the sheriff and the giving of a bond for \$5,000 more, and that the defendant paid the sum, which included the item of \$209.38. This transaction was not a tender, and did not fall within the rule laid down in *Currier v. Jordan*, 117 Mass. 260, and *Bouvé v. Cottle*, 143 Mass. 310, 315. It would seem to have been only a substitution of securities in the sheriff's hands, and to have left the correctness of the figures open to trial with the rest of the case.

The second count also was for items outside the contract, and only one of them was disputed. This was for some articles not finished because the defendant, after the plaintiff refused to go on with its contract, took away jigs and tools which it had furnished the plaintiff under the contract, and also the unfinished articles. There is nothing in the report which necessarily implies that the failure to finish the articles was due to the plaintiff's fault, or indeed to any other cause than the defendant's removal of them. Therefore we cannot say that the auditor's finding was wrong.

A part of the damages to be recovered by the plaintiff on the larger contract will be for work done under it. *Goodman v. Pocock*, 15 Q. B. 576, 580. Therefore one other question requires a few words. The defendant made a tender on May 31 of the amount then due, including the \$90 claimed under the contract, which was refused. But this tender has not been pleaded or kept good, even if, as does not appear very clearly, it embraced the sums now recovered. Therefore it does not prevent the recovery of interest and costs. The answer was a general denial. *Brickett v. Wallace*, 98 Mass. 528, 529; *Grover v. Smith*, 165 Mass. 132. See *Noble v. Fagnant*, 162 Mass. 275, 286. The payment to the sheriff was not a payment into court or an admission that the sum paid was due, as we have said and as the plaintiff contends. In *Suffolk Bank v. Worcester Bank*, 5 Pick. 106, the amount tendered was deposited in a bank to the order of the plaintiff, and in *Goff v. Rehoboth*, 2 Cush. 475, the defendant was a town, and the treasurer might be presumed to have kept the money on hand in obedience to the order of the selectmen. In both the tender was set up and the money brought into court. See Pub. Sts. c. 168, § 23; *Town v. Trow*, 24 Pick. 168, 169; *Sanders v. Bryer*, 152 Mass. 141. There

was another tender after suit brought, but that did not comply with Pub. Sts. c. 168, § 24, and is not relied upon.

*Case to stand for assessment of damages.*¹

HENRY W. GREEN, RESPONDENT, v. THOMAS EDGAR AND OTHERS, APPELLANTS.

NEW YORK SUPREME COURT, GENERAL TERM, JUNE TERM, 1880.

[Reported in 21 Hun, 414.]

JUDGMENT reversed, and new trial ordered before another referee, costs to abide event. *Held*, that a servant may be discharged by the master from his employment, provided a sufficient cause actually exists, whether the same was known to or assigned by the master at the time of the discharge or not; and that the special findings show that sufficient grounds for the discharge existed at the time of the discharge.²

BAKER v. HIGGINS.

NEW YORK COURT OF APPEALS, JUNE, 1860.

[Reported in 21 N. Y. 397.]

APPEAL from the Supreme Court. Action to recover for brick sold and delivered. The trial was before a referee, who received parol evidence of a contract for the sale of the brick. It subsequently appearing that the contract was put in in writing, the defendant moved that the parol evidence of its tenor should be stricken out. To the referee's refusal to strike out the evidence, and to his refusal to nonsuit the plaintiff, the defendant took exceptions. The referee, in his finding of facts, found, in accordance with the parol evidence, that the defendant agreed to pay for the brick as fast as delivered. Judgment

¹ See also *Eastern Forge Co. v. Corbin*, 66 N. E. Rep. (Mass.) 419. Compare *Franklin v. Miller*, 4 Ad. & E. 599.

² *Baillie v. Kell*, 4 Bing. N. C. 638; *Spotswood v. Barrow*, 5 Ex. 110; *Willets v. Green*, 3 C. & K. 59; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339; *Abendpost Co. v. Hertel*, 67 Ill. App. 501; *Odeneal v. Henry*, 70 Miss. 172; *Allen v. Aylesworth*, 58 N. J. Eq. 349; *Arkush v. Hanan*, 60 Hun, 518; *McIntyre v. Hockin*, 16 Ont. App. 501; *Tozer v. Hutchison*, 12 N. B. 548, acc. But see *Cassons v. Skinner*, 11 M. & W. 161; *Strauss v. Meertief*, 64 Ala. 299, 310.

In *Higgins v. Eagleton*, 155 N. Y. 466, 472, an action by one entitled to a conveyance of real estate, the court said: "The plaintiff, on the law day, having made specific objections to the title, which were unfounded, could not subsequently raise a new objection, even if it was valid where, as in this case, it was one that could have been obviated by the defendant. *Benson v. Cromwell*, 6 Abb. Pr. Cas. 83, 85." See also *Faisley v. Wills*, 18 Ont. App. 210.

for the plaintiff, upon his report, having been affirmed at general term, in the third district, the defendant appealed to this court.

Roswell A. Parmenter, for the appellant.

John B. Bronk, for the respondent.

WELLES, J. On the trial before the referee, the plaintiff gave evidence tending to show that, by the contract between him and the defendant for the sale and delivery of the brick in question by the former to the latter, the brick was to be paid for as they were delivered. It also appeared, on the part of the plaintiff, that, at the close of the conversation between the parties by which the contract was negotiated, the plaintiff wrote something on a piece of paper and handed it to the defendant, upon which the parties separated. None of the plaintiff's witnesses were able to state what the writing contained. The defendant produced and identified the paper, which turned out to be as follows: "I will deliver John Higgins 25,000 pale brick, on the dock at East Troy, for \$3 per M, and 50,000 hard brick, at the same place, at \$4 per M, cash. E. W. Baker, Coxsackie." This, I think, was a valid agreement, and must be deemed and taken as the agreement then made between the parties in relation to the brick, and under which a part was afterwards delivered.

Not long after this agreement, the plaintiff delivered to the defendant, at Troy, under the written contract, a cargo of brick, consisting of 10,500 hard and 10,500 pale bricks, and demanded payment for that quantity, which the defendant refused until the whole was delivered. This, I think, he had a right to do. The contract was entire, to deliver 75,000 bricks; and the plaintiff was not entitled to pay for any part until the whole was delivered, or until he was ready and offered to deliver the balance, which the plaintiff has not done. The action was brought for the contract price of the 21,000 bricks delivered; and the referee found, contrary to the legal import of the written agreement, that the brick was payable on delivery, as the same should be delivered. For this error the judgment should be reversed, and a new trial directed in the court below, with costs to abide the event.

SELDEN, CLERKE, and WRIGHT, JJ., dissented; all the other judges concurring, *Judgment reversed, and new trial ordered.*¹

¹ First Nat. Bank v. Perris Irrigation District, 107 Cal. 55; Haslack v. Mayers, 26 N. J. L. 284; Catlin v. Tobias, 26 N. Y. 397; Nightingale v. Eiseman, 121 N. Y. 288; Witherow v. Witherow, 16 Ohio, 238; Easton v. Jones, 193 Pa. 147, acc. See also Hamilton v. Thrall, 7 Neb. 210; 7 Am. & Eng. Encyc. (2d ed.) 97.

Compare Aultman & Taylor Co. v. Lawson, 100 Iowa, 569; Gill v. Johnstown Lumber Co., 151 Pa. 534; McLaughlin v. Hess, 164 Pa. 570.

Contracts of service for a specified term are held severable when the wages can be construed as payable at specified shorter periods. Taylor v. Laird, 1 H. & N. 266; Button v. Thompson, L. R. 4 C. P. 330; Davis v. Preston, 6 Ala. 83; Jones v. Dunton, 7 Ill. App. 580; White v. Atkins, 8 Cush. 367; Chamblee v. Baker, 95 N. C. 98; Markham v. Markham, 110 N. C. 356; Matthews v. Jenkins, 80 Va. 463; La Coursier v. Russell, 82 Wis. 265.

Compare Decamp v. Stevens, 4 Blackf. 24; Davis v. Maxwell, 12 Met. 286; Lantry v. Parks, 8 Cow. 63; Monell v. Burns, 4 Denio, 121; Larkin v. Buck, 11 Ohio St. 561; Diefenback v. Stark, 56 Wis. 462.

HOARE AND OTHERS v. RENNIE AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 14 & 16, 1859.

[Reported in 5 Hurlstone & Norman, 19.]

Handwritten note on left margin: "see on contract clause, Tuesday, 11th Jan, no liability of pack."

DECLARATION. First count: That, on the 21st of April, A.D. 1857, the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in good condition ex ship, on arrival in the port of London; and it was thereby then further agreed, amongst other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size; but that, if any variation therein, it should not exceed one ton, and such variation to be corrected in subsequent shipments; that sellers should have the option of commencing shipments in May, 1857, and also of completing the whole by the end of July, 1857; that ships' names should be declared as soon as known to the sellers; that if any should be lost on the voyage the quantity lost should be null and void; and that there should be discount at the rate of two and a half per cent for cash against each delivery. **Averments:** That plaintiffs had done all things necessary on their part to be done, &c.; and though all things had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, &c.

Second count: That on the 21st of April, A.D. 1857, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned; and that from the time of the making the agreement continually until after the refusal, notice, and discharge hereinafter mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants; and that at and after the refusal, notice, and discharge hereinafter mentioned, they were ready and willing to perform the agreement on their part; and although the plaintiffs, in part performance of the said agreement, did, in June, A.D. 1857, ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants, and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the

same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them; and wholly waived such execution and performance; whereby, &c.

Third plea to the first count: That the plaintiffs did not avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a quantity of the said iron so contracted for, to wit, 21 tons, 6 cwt., 1 qr., being a much less quantity than was required to be shipped during the said month of June according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid; that the plaintiffs failed to complete the shipment for the month of June, according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June; and that the defendants, having notice of all the premises in this plea mentioned, did afterwards refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

*last initial breach, or later
first month*
Wilde (with whom was Holland), in support of the demurrer. The question is whether, upon the statement of the contract in the declaration, it appears that the shipment in about equal portions in each month is a condition precedent to the plaintiffs' right to sue for the non-acceptance by the defendants of what was actually shipped. The provision for the shipment in about equal proportions during each month is evidently not treated as being so essential as to go to the whole consideration of the contract. Great latitude is allowed to the sellers. They may begin the shipment in June and end in July, in which case they would ship about 333 tons in each month; or begin in May and end in September, when the quantity would be about 133 tons in each month. That shows that the gist of the contract was not that any definite quantity should be shipped in any particular month. If this is a condition precedent, though shipments had been made in due course in May, June, and July, if a short quantity was shipped in

August, the defendants might say that the previous shipments were not under the contract. Therefore, according to the rules laid down on this subject in the notes to *Pordage v. Cole*¹ and *Cutter v. Powell*,² it will not be so construed. The price is 15*l.* 10*s.* a ton, to be paid on delivery. The time for the payment for the first parcel shipped might therefore arrive before any failure of the condition alleged to be precedent. ~~No condition can be precedent unless the whole thing which is to be done is to be done precedently.~~ In *Ritchie v. Atkinson*, on a contract that a ship should go to St. Petersburg and there load from the factors of the freighters a complete cargo of hemp and iron, and proceed to London and deliver the same on being paid freight after certain rates per ton named in the contract, it was held that the delivery of a complete cargo was not a condition precedent, and that the master might recover for a short cargo at the rates mentioned, the freighter having his remedy in damages. Lord Ellenborough there pointed out that the defendant's argument must go the length of saying that if the cargo wanted a single ton of being a complete cargo that would be a defence. *Stavers v. Curling* was a similar decision upon a contract to procure a cargo of sperm oil, or as great a proportion as might be within the plaintiff's power to obtain. It is consistent with the allegations in the plea that the defendants have sustained no damage, because a parcel shipped on the 1st of July from one port might arrive before one shipped on the 30th of June from another port in Sweden. The plea should have shown or stated that the object of the contract was frustrated by the default: *Tarrabochia v. Hickie*, *Freeman v. Taylor*, *Graves v. Legg*. In *Glaholm v. Hays* the Court thought that an express stipulation that a vessel "shall sail" on a day named shows that particular importance is attached to it. In *Dicker v. Jackson* the delivery of an abstract, and deducing a clear title to an estate contracted to be sold, was held not to be a condition precedent to the right to maintain an action for the purchase-money, on the ground that the time for the payment of the money might happen before the time provided by the contract for the delivery of the abstract, &c., had arrived. [WATSON, B. Suppose no iron was shipped in June, July, or August, could the defendants have been compelled to accept the whole in September?] The substance of the contract is that the iron is to be delivered in four months, not month after month.

Bovill, in support of the pleas. The defendants have agreed to pay for certain goods to be shipped in June; the plaintiffs contend that the defendants must accept goods not shipped in June. The argument for the plaintiffs must go this length, that if they shipped no iron in June, July, or August, and but ten tons in September, the defendants would be bound to accept those ten tons. Surely that would not be in any sense a performance of the contract on the part of the plaintiffs. [POLLOCK, C. B. If the first parcel sent might have been according to the

¹ 1 Wms. Saund. 390*a.*

² 2 Smith's Lead. Ca. 1.

contract, can it be contended that the defendants could refuse to accept it on account of any subsequent default, as, for instance, if they afterwards discovered that the plaintiffs were not going to complete the June shipment?] In the present case, the defendants did not refuse to accept the shipment in question until after notice that the plaintiffs had broken their contract by not shipping the right quantities in June; in other words, ("until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the agreement?") The option being to accelerate the deliveries, any presumption that the plaintiffs were at liberty to retard the shipments is excluded. Under an ordinary mercantile contract for goods to be supplied in June, the buyer would not be bound to accept them if tendered in July. In *Ritchie v. Atkinson* the cargo had been accepted by the defendants. In *Stavers v. Curling* the agreed voyage had been performed, and the owners had had the benefit of the cargo. The breach of the agreement to be frugal of stores was a small part only of the consideration. Here there had been no tender before the plaintiffs had entirely failed to perform their part of the agreement. [The quantity to be shipped, and the time in which it was to be shipped, were of the essence of the contract. That brings the case within the authority of *Freeman v. Taylor*, and distinguishes it from *Tarrabochia v. Hickie*. (The cases on charter-parties are uniform that where a time is mentioned for the being ready to load or the like, it is of the essence of the contract.) *Glaholm v. Hayes*, *Ollive v. Booker*, *Oliver v. Fielden*. The principle which governed *Ellen v. Topp*, and *Graves v. Legg* applies, because the tender was not a partial performance of the contract, but an offer or readiness to do something which was no performance of the contract at all. [POLLOCK, C. B. The principle of *Boone v. Eyre* applies to the partial breach of a single contract, but surely not to a breach of a continuing contract, as to supply goods from day to day or from week to week, where during the contract one party becomes wholly incapable of performing his part. Suppose in June the plaintiff had shipped nothing, could he say, I will pay damages for that, and insist on going on with the contract and supplying the rest of the iron in July, August, and September? In such a case, if one fails on his part, the other cannot insist that the contract shall go on. It may be different if a partial performance has been accepted.]

Wilde replied (Nov. 15). The doctrine of conditions precedent never has been applied where continuous acts are to be performed. In *Withers v. Reynolds*, where the defendant had agreed to supply straw at a certain price per load, and the plaintiff always insisted on keeping one payment in arrear, it was held that, on the plaintiff's refusal to pay, the defendant was not bound to send any more; but *Patteson, J.*, said, "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff expressly refuses to pay for the loads as delivered." In the present case the defendants cannot avoid the

contract altogether because the shipments in some one month are not in all respects according to the contract. The quantity shipped in June is not said to have been an unreasonable quantity for shipment in that month. [POLLOCK, C. B. The expressions in the contract are loose, and allow some latitude to the plaintiffs, but not so as to permit them to ship twenty tons in the month instead of 160. WATSON, B. The pleas aver that the shipment was not according to the contract.]

POLLOCK, C. B. We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that which is a breach of an agreement is a performance of it. On that ground, this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August, and September, about one-fourth part in each month; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons, as a performance of the contract. The first count states that the plaintiffs performed all things necessary on their part to be performed, that they were ready and willing to do all things which according to agreement it was necessary they should be willing to do, and that all things happened to entitle the plaintiffs to a performance of the agreement on the part of the defendants. This is denied by the plea. The second count states that the plaintiffs, in part performance of the contract, shipped a certain portion of the iron, and in further performance of the agreement tendered and offered to deliver the said portion so shipped, yet defendants refused to accept the same. The pleas raise the question whether the defendants were bound to accept and pay for what was sent and tendered; the plaintiffs having, in June, shipped from Sweden a quantity much less than they were bound to have shipped, and the defendants having insisted that this was a breach of the contract, and given notice that they refused to accept the residue. The pleas expressly state that the plaintiffs were not ready to deliver such a quantity of iron shipped from Sweden in June as is specified in the contract, and were not ready and willing to deliver the small quantities shipped until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing to perform their part of the agreement. The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one-hundredth

part, instead of one-fourth part, in June, the defendants' remedy would have been by a cross-action. [The case was put of the plaintiffs sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. (Where a person has derived a benefit from a contract he cannot rescind it, because the parties cannot be put *in statu quo*.) Probably, therefore, in such case the defendants could not have repudiated the contract, and must have been left to their cross-action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. (Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.]

WATSON, B. I am of the same opinion. (His lordship read the contract stated in the declaration.) The contract is for the shipment of a quantity of iron in certain proportions, to be paid for on delivery. On performance of the contract the defendants agree to pay for the iron. The breach charged here is that the defendants shipped a small quantity in June, and declared that they would not ship more [*sic*]. The pleas aver that the shipment was not according to the contract. The obligation on the part of the defendants is merely to receive and pay for the goods according to the contract. [Looking at the contract, the options given are all for the purpose of accelerating the shipments. Instead of shipping in June, the plaintiffs may ship a portion in May. The plaintiffs might have accelerated, but had no right to delay the delivering of the iron.] Having done so, they have not performed their contract. The substance of the agreement in *Ritchie v. Atkinson* was that the plaintiff should go to Russia and bring home a cargo; and that was done; though, in consequence of the embargo, a full cargo had not been loaded. A similar observation applies to *Boone v. Eyre*. But on the sale of goods where the price is to be paid on delivery, can it be said that there is no condition to deliver them? Therefore, the defendant was not obliged to accept a small portion of that which should have been the shipment in June.

CHANNELL, B. On the pleas the defendants are entitled to judgment. (The substantial question is, whether the defendants were bound to accept the portion which was tendered at the time at which it was tendered.) That does not depend on the month in which it was tendered, but on the position of the parties at the time of the tender, by which the defendant was placed in the same situation as if, at the time of the tender, notice had been given to him that there would be no

further shipment in all June. I think that there was not in the month of June such a shipment as was made necessary by the contract. Mr. Wilde admitted that the pleas might have been good if they had contained an averment to that effect. In some cases such an averment may be necessary. It would be so here, but that this is substantially a contract to ship one-fourth of the iron in June. There are options to vary the time of performance, which gave the plaintiffs the right to accelerate but not to delay it. The plaintiffs have not performed their part of the contract, and the defendants have not accepted anything which can be construed as an imperfect execution of the contract by the plaintiffs. The defendants were thus at liberty to rescind the contract, and our judgment must therefore be for the defendants upon the demurrer to the pleas.

Judgment for the defendants.

JONASSOHN AND ANOTHER v. YOUNG.

IN THE QUEEN'S BENCH, JUNE 24, 1863.

[Reported in 4 Best & Smith, 296.]

THE declaration stated that it was agreed by and between the plaintiffs and the defendant, that the plaintiffs should sell and deliver to the defendant, and that the defendant would purchase of the plaintiffs, as many of the plaintiffs' Nettlesworth gas coals, equal in quality to a certain cargo of them before then shipped on trial by a steam vessel called the Great Northern, as one steam vessel could fetch in nine months, proceeding to Sunderland, and after loading the cargo proceeding with it from thence to London, and after discharging the cargo at London proceeding back again to Sunderland for another cargo, and thence back again with the cargo to London, and so on until the expiration of the nine months; the steam vessel to be sent by the defendant for the coals, and the plaintiffs to ship them on board of it at Sunderland, at and for a certain price, to wit, 5s. 9d. per ton, to be paid by the defendant to the plaintiffs at the beginning of each month for the preceding month's supply, less 2l. 10s. per cent discount. Averment: that the plaintiffs have always been ready and willing to sell and deliver to the defendants and ship the coals on the terms aforesaid, and have done all things, and all things have happened, and all times have elapsed necessary to entitle the plaintiffs to have the agreement performed by the defendant on his part, &c. : Yet the defendant neglected and refused to send, and made default in sending a steam vessel to Sunderland to fetch divers cargoes, or the quantity of the coals which he ought, according to the agreement, to have fetched and accepted; and the defendant, before the expiration of the nine months, wholly and abso-

lutely refused to send any other steam vessels for the coals, or to accept any more of the coals, and declared to the plaintiffs that he would not perform any more the agreement, and exonerated and discharged the plaintiffs from any further performance thereof on their part; and by reason of the premises the plaintiffs have been much injured.

Third plea: That, before any breach by the defendant of the agreement, the plaintiffs broke the contract by delivering and shipping to the defendant, in pretended fulfilment thereof, gas coal which was no part thereof equal in quality to the cargo shipped on trial, but was very inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiffs well knew; whereupon and wherefore the defendant, immediately upon discovering the plaintiffs' default, and within a reasonable time in that behalf, refused to fetch or accept any more of the coal.

Fourth plea: That, before any breach by the defendant of the agreement, the plaintiffs broke their contract, to wit, by detaining the defendant's vessel an undue and unreasonable length of time, and far beyond the time permitted by the contract, and contrary to the defendant's will, upon divers occasions upon which the defendant had sent the same to the plaintiffs to be loaded with coal under the agreement, and by not loading the vessel with coal as aforesaid, on any or either of the occasions, until after the lapse of a long and unreasonable space of time after they had notice that such vessel was ready to receive coal, and thereby greatly injured and damnified the defendant; whereupon and wherefore he, immediately upon notice of the plaintiffs' default, refused to fetch or receive any more of the coal.

Demurrer to each plea, and joinder.

Hannen (*Bidder* with him), in support of the demurrer.

The substance of both pleas is, that, because the contract had been broken in part by the plaintiffs — whether in not delivering coals equal to sample, or in detaining the defendant's vessel beyond the time permitted by the contract, — the defendant is justified in refusing to carry out the contract for the remainder of the period to which it related: but such a plea is bad both on principle and authority; *Weaver v. Sessions*,¹ *Franklin v. Miller*. In *Withers v. Reynolds*, where there was a refusal by the plaintiff to complete the contract, *Patteson, J.*, said, p. 885, "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract." [*WIGHTMAN, J.* The plaintiff in effect said, "If you send a load of straw I will not pay for it." *CHROMPTON, J.* If the purchaser of goods refuses to pay for them, or is insolvent, the vendor is not bound to deliver. But these pleas allege a breach of the contract by the plaintiff as to part only.] They

¹ 6 Taunt. 154.

*It seems now
that facts before
the court you
must construe
as law from
the pleadings.
Hannen's claim
is facts.*

do not show that the plaintiffs were unable or unwilling to supply coals according to the contract. In *Hoare v. Rennie* the plea alleged that the plaintiffs failed to complete a shipment of iron for the month of June according to the contract, and were never ready and willing to deliver to the defendants such a quantity of iron in June as was specified in the contract; and the plea was held good: there the refusal of the plaintiffs to supply the iron would have postponed the performance of the contract indefinitely. [CROMPTON, J. That case belongs to the class in which the breach alleged in the plea is an entire frustration of the contract. BLACKBURN, J., referred to *Hochster v. De La Tour*.¹]

Keane, contra. *Hoare v. Rennie* supports the third plea. As soon as the defendant discovered that the plaintiffs had knowingly sent an inferior coal to that stipulated for, he was justified in throwing up the contract. [WIGHTMAN, J. Suppose the plaintiff intended in future to send such coal as was stipulated for? BLACKBURN, J. — The third plea does not aver that the plaintiffs persisted in sending an inferior coal.] The contract is the employment of a vessel during a limited time, and for getting coal of a specified quality; the non-supply of that coal, and the unnecessary detention of the vessel by the plaintiffs, go to the root of the contract. [CROMPTON, J. The vice of both pleas is the same, that the breach goes only to part of the consideration. The argument for the defendant must go this length, that the supply of one chaldron of coal of an inferior quality, or the unnecessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract. In *Hoare v. Rennie* we must take it that time was of the essence of the contract. BLACKBURN, J. The reasoning of the judges in that case does not apply to the plea pleaded to the second count. As reported, it looks as if the Court forgot the second count. CROMPTON, J. We must consider that the breaches alleged in the pleas in that case went to the root of the matter.]

Hannen was not called upon to reply.

Per Curiam. (WIGHTMAN, CROMPTON, and BLACKBURN, JJ.)

*Judgment for the plaintiffs.*²

¹ 2 E. & B. 678.

² Defective quality of instalments previously delivered was held no defence to the buyer in *Wayne's Coal Co. v. Morewood*, 46 L. J. Q. B. N. s. 746; *Guernsey v. West Coast Lumber Co.*, 87 Cal. 249; *Vallens v. Tillman*, 103 Cal. 187; *Blackburn v. Reilly*, 47 N. J. L. 290; *Scott v. Kittanning Coal Co.*, 89 Pa. 231.

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SIMPSON AND ANOTHER v. CRIPPIN AND ANOTHER.

IN THE QUEEN'S BENCH, NOVEMBER 26, 1872.

[Reported in Law Reports, 8 Queen's Bench, 14.]

DECLARATION on a contract to supply from 6,000 to 8,000 tons of coal, to be delivered in equal monthly quantities during the period of twelve months, from the 1st of July, 1871. Breach: that the defendants did not deliver the coal monthly, and had refused wholly to deliver the coal and to perform the contract.

Plea, *inter alia*: That the plaintiffs were not ready and willing to accept the coals, and that the defendants were prevented from delivering the coals, and performing the agreement, by the acts, neglects, and defaults of the plaintiffs.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it appeared that the defendants were coal proprietors, and the plaintiffs were coal merchants. On the 10th of June, 1871, the plaintiffs wrote to the defendants the following letter:—"We agree to take from you about 6,000 to 8,000 tons of your best Wigan four-foot coal, at 5s. 6d. per ton of 21 cwt. to the ton, put into our wagons at the colliery. Delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½ per cent discount."

The defendants, by letter also dated the 10th of June, replied as follows: "We agree to supply you from 6,000 to 8,000 tons of our best four-foot Wigan coal, properly screened, and free from slack, to be delivered into your wagons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next—strikes of our workmen, accidents, and other circumstances beyond our control excepted—at 5s. 6d. per ton of 21 cwt. Terms, cash monthly, less 2½ per cent discount."

On the 8th of July the defendants wrote, complaining that the first week for the fulfilment of the contract had terminated without the plaintiffs sending wagons or orders for coals. The correspondence continued, the defendants requesting that wagons might be sent, and the plaintiffs promising to comply. During the month of July the plaintiffs took from the defendants only 158 tons of coal. On the 1st of August the defendants wrote to the plaintiffs, that inasmuch as the latter had only taken 158 tons during the month of July, and as the sole inducement for the defendants to entertain the contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months, which they had failed to perform, the defendants gave notice that the contract was cancelled. On the 2nd of

August the plaintiffs replied, stating that they would not allow the contract to be cancelled.

On these facts the learned judge told the jury, that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants, in point of law, in cancelling the contract, and left the question of damages to them.

The jury found a verdict for the plaintiffs for 475*l.*, leave being reserved to move to enter a verdict for the defendants.

A rule was afterwards obtained upon the ground that under the circumstances the plaintiffs had disentitled themselves to sue for the breach of the contract, and that the defendants were entitled to cancel the contract, and refuse to deliver the residue of the coal.

Butt, Q. C., and *Commings*, showed cause. The plaintiffs are entitled to retain the verdict; the defendants could not annul the contract. The case is distinguishable from *Hoare v. Rennie*; in that case time was of the essence of the contract; and there is another distinction, that in the present case there was a part performance by the plaintiffs in the month of July; but in *Hoare v. Rennie* there was a complete breach by the plaintiffs in the first instance. Here the contract is to deliver coals by twelve deliveries independent of each other. The case is governed by *Jonassohn v. Young*. This case does not fall within that class of cases, of which *Withers v. Reynolds* is an example, that where a breach has been committed which goes to the whole consideration the contract may be rescinded.

Holker, Q. C., and *Baylis*, in support of the rule. The question is whether the stipulation on the part of the plaintiffs to take coals by equal monthly quantities goes to the root of the contract so that the breach of it entitles the defendants to annul the entire agreement. This is a case in which the breach goes to the whole root and consideration of the contract, within the meaning of the decision of Lord Ellenborough in *Davidson v. Gwynne*. This is not a distinct stipulation for the breach of which the defendants might be compensated in damages. The conditions are mutual, and ought to have been performed on both sides, as is laid down in the notes in *Pordage v. Cole*.¹ This case is not distinguishable from *Hoare v. Rennie*, which is supported by *Bradford v. Williams*, and *Coddington v. Paleologo*.²

BLACKBURN, J. I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the

¹ 1 Wms. Saund. 819*l.*

² Law Rep. 2 Ex. 193.

moved to higher court.

re-sent. & with 100 tons of coal.

letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but ~~it is said that Hoare v. Rennie is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction.~~ It is, however, difficult to understand upon what principle Hoare v. Rennie was decided. If the principle on which that case was decided is that, wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Portage v. Cole*. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. Hoare v. Rennie was questioned in *Jonassohn v. Young*.

MELLOR, J. I agree generally with what my brother Blackburn has said; and I think that it is difficult to reconcile Hoare v. Rennie with some of the other cases which have been cited; but I cannot distinguish that case from the present. Where the facts are not distinguishable, I think we are bound to give effect to the judgment of a court of co-ordinate jurisdiction. I should have thought, therefore, if the decision depended upon me, that in deference to that case we ought to make the rule absolute, and leave the plaintiffs to appeal.

LUSH, J. I am of opinion that the rule should be discharged. I cannot understand the judgments in Hoare v. Rennie. The Court must have interpreted the contract in that case as if time were of its essence; there are no words here which import such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation.

Rule discharged.

FREETH AND ANOTHER v. BURR.

IN THE COMMON PLEAS, JANUARY 14, 1874.

[*Reported in Law Reports, 9 Common Pleas, 208.*]

. . . ² THIS cause was tried before Brett, J., at the Sittings in London after last Hilary Term. The plaintiffs and the defendant were iron-merchants and manufacturers. In November, 1871, the plaintiffs

¹ *Cresswell Co. v. Martindale*, 63 Fed. Rep. (C. C. A.) 84; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. Rep. 298; *Middle Division Elevator Co. v. Vandeventer*, 80 Ill. App. 669, *contra*. See also *Worthington v. Gwin*, 119 Ala. 44; *Hamilton v. Thrall*, 7 Neb. 210.

² The pleadings have been omitted.

agreed to buy of the defendant 250 tons of pig-iron, and on the 28th of that month bought and sold notes were exchanged. The bought-note, signed by the plaintiffs, was as follows:—

LONDON, 28th November, 1871.

Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig-iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash 14 days after delivery of each parcel.

The market was rising, and early in February the plaintiffs wrote to the defendant, remonstrating with him for not having delivered any of the iron. About the 15th of that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant as follows:—

We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you.

On the 17th of May, 1872, the defendant wrote to the plaintiffs as follows:—

We are informed that the lighter which we sent with 30 tons Kentledge pig-iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th instant.

On the 18th the plaintiffs wrote to the defendant:—

In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?

To this the defendant replied on the 21st:—

It is our intention to deliver remainder of pig-iron, and do not wish you to buy against us. We inclose invoice of last lot.

On the 29th of May, 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs:—

Would you kindly forward us cheque in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder.

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur

In case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered.

On the 12th of June, the defendant's attorneys wrote to the plaintiffs' attorney:—

We hardly think it necessary to refer to your clients' claim for 250*l.*, as it is purely hypothetical and could not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (352*l.* 15*s.* 10*d.*) mentioned in our letter of the 5th instant.

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plaintiffs' refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. *Hoare v. Rennie* was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery; and he directed a verdict to be entered for the plaintiffs for 148*l.* 16*s.*, reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

Garth, Q. C., in Easter Term last, obtained a rule *nisi* accordingly.

Watkin Williams, Q. C., and *E. Clarke*, who appeared to show cause, were stopped by the Court.

Garth, Q. C., and *Philbrick*, in support of the rule. The iron was not delivered according to the strict terms of the contract; but the correspondence shows that the time for delivery had been extended by mutual consent. The whole of the first parcel having been delivered, the defendant was entitled to payment for that parcel in fourteen days. ~~Payment was demanded and refused.~~ The defendant had then a right, according to the principle laid down in *Hoare v. Rennie*, to treat that refusal as a breach, and to rescind the contract. In that case the plaintiffs had undertaken to deliver to the defendants 667 tons of iron, to be shipped from Sweden in the months of June, July, August, and September, and in about equal portions each month. In June the plaintiffs delivered twenty-one tons only; whereupon the defendants gave them notice that they would receive no more; and the Court of Exchequer

held that they were justified in considering the contract as at an end. Pollock, C. B., in delivering judgment, said: "At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for." So, here, the non-performance by the plaintiffs of the stipulation as to payment for the first parcel entitled the defendant to assume that they repudiated the contract. In *Withers v. Reynolds* the refusal by the buyer to perform his part of the contract by paying for each load of straw as delivered, was held to entitle the seller to rescind the contract.

[DENMAN, J. There the plaintiff did acts and said things which amounted to a declaration on his part that he did not mean to perform the contract.]

Hoare v. Rennie was distinctly recognized in *Bradford v. Williams*, though somewhat reflected upon in *Simpson v. Crippin*.

[DENMAN, J., referred to *Jonassohn v. Young*.]

LORD COLERIDGE, C. J. The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on the 28th of November, 1871, in the following terms: "Bought of Messrs. D. M. Burr & Co. 250 tons of pig-iron, at 56s. per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel." The material facts were these: There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until the 12th of May, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the full delivery of the first parcel, viz., on the 29th of May, 1872, the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterwards demanded delivery of the remaining 125 tons; and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, viz., that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the ques-

tion is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which *Hoare v. Rennie* was decided, whether rightly or not upon the facts, I will not presume to say. Where, by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonassohn v. Young* that that case may be supported. In *Withers v. Reynolds* there was an express refusal by the plaintiff to perform the contract; and *Patteson, J.*, says: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract." *Wightman, J.*, certainly, and *Crompton, J.*, by inference, in *Jonassohn v. Young*, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my brother *Brett* having ruled that the mere non-payment for the first portion of the iron contracted for, (unattended by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself). I am of opinion that his ruling was correct, and that the rule should be discharged.

Decision of the Court is in favour of the plaintiff.

KEATING, J. I entirely agree in the judgment pronounced by my lord, and in the principle upon which he puts it. It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element. But, looking at all the circumstances of this case, — a rising market; a failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the times for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances,

but with a requisition to the seller to fix a day for the delivery of a certain quantity; I do not think they show an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, but, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat the contract as rescinded and to refuse to deliver the remainder of the iron.

DENMAN, J. I am of the same opinion. The learned judge ruled that the mere refusal by the plaintiffs to pay for the portion of the iron delivered did not warrant the defendant in considering the contract as at an end; and he gave the defendant leave to move to enter a verdict or a nonsuit if the Court should think that ruling wrong. I am of opinion, upon the authority of *Withers v. Reynolds*, that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But, in the words of Patteson, J., the conduct of the plaintiff, coupled with the non-payment, amounted to an express refusal to perform the contract on his part. There was nothing of the sort here. After the way in which that case has been treated in subsequent authorities, I think we are bound to hold it to be a correct statement of the law, and to act upon it. Notwithstanding the plaintiffs' refusal to pay, the defendant was bound to go on and deliver the rest of the iron.

Rule discharged.

THE MERSEY STEEL AND IRON CO. (LIMITED), APPELLANT,
v. NAYLOR, BENZON, & CO., RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 28, 1884.

[Reported in 9 Appeal Cases, 434.]

APPEAL from an order (dated June 13, 1882) of the Court of Appeal (Jessel, M. R., Lindley and Bowen, L. JJ.) reversing an order of Lord Coleridge, C. J. The facts are fully set out in the report of the decisions below. The facts material to the present report may be stated as follows: The respondents bought from the appellant company 5000 tons of steel of the company's make to be delivered 1000 tons monthly commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2d of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, *bonâ fide*, under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payment then due unless

the company obtained the sanction of the court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery. The referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal, by an order dated the 13th of April, 1883, gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

March 27, 28. *A. Cohen*, Q. C., and *French* (*C. Russell*, Q. C., with them) for the appellants.

Sir *F. Herschell*, S. G. (*Bigham*, Q. C., with him), for the respondents.

EARL OF SELBORNE, L. C. I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr*, Law. Rep. 9 C. P. 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore

It is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1000 tons monthly commencing January next;" and as to the time of payment, "Payment nett cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion. Now, the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act, 1862 (sect. 153), which appeared to the advisers of the purchasers to admit of the construction that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently *bonâ fide*, because they doubted, on the advice of their solicitor, whether that section of the act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist, namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of

the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who, if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th of February, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added, "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion; and that there is no principle deducible from any of the authorities which supports that view of such — I hardly like to call it a refusal — of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on the 10th of February, 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it; and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th of February, 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and, according to the view which has been taken in the Court of Appeal of the effect of the 10th section of the act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding,

in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced, — a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they expressed their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN. I have no doubt that *Withers v. Reynolds*, 2 B. & Ad. 882, correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in *Withers v. Reynolds*, 2 B. & Ad. 882, it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster v. De la Tour*, 2 E. & B. 678, in the Queen's Bench, and has never been doubted since; because there is a legal breach of the contract although the time indicated in the contract has not arrived.

That is the law as laid down in *Withers v. Reynolds*, 2 B. & Ad. 882. That is, I will not say the only ground of defence, but a sufficient ground of defence. In *Freeth v. Burr*, Law Rep. 9 C. P. 208, it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bonâ fide* statement, and a very plausible statement. I will

not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers v. Reynolds*, 2 B. & Ad. 882, and *Freeth v. Burr*, Law Rep. 9 C. P. 208, and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole*, 1 Wms. Saund. 548, ed. 1871), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said that whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. [I quite agreed that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of *Hoare v. Rennie*, 5 H. & N. 19, it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in *Honck v. Muller*, 7 Q. B. D. 92, which has been referred to, it is expressly and pointedly shown that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver and of the other to take 2000 tons of iron, and that inasmuch as it was to be by three instalments and the first was gone and there never could be more than two thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two thirds when the plaintiff

required the two thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract; whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract; and that being so, these cases have really no bearing upon the matter.

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD WATSON. My Lords, I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shows that the delay in making payment of that part of the contract price which ought to have been paid on the 5th of February, was due to these two causes; in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make second payment of the price, and in the second place an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2d of February and the respondents' firm were advised by their law agent that they were not in safety to pay until the liquidator was appointed.

That brings us down to the 15th of February. At that date this had taken place, the company had given notice on the 10th of February of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator, I think, consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

LORD BRAMWELL. My Lords, I am of the same opinion, and shall say but very few words. My Lord Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but if they

had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers v. Reynolds*, 2 B. & Ad. 882, and the reasoning which you have heard. But I really cannot, with great submission to the noble Lord, find any evidence of that, and Mr. Cohen certainly did not attempt to prove it; but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree.

I have just one other word to say. I cannot tell why *Honck v. Muller*, 7 Q. B. D. 92, and *Hoare v. Rennie*, 5 H. & N. 19, should be brought forward upon this occasion. I do not think that I said in *Honck v. Muller*, 7 Q. B. D. 92, what Sir George Jessel supposed me to have said, namely, that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case. What I was busy upon in that case was in showing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck v. Muller*, 7 Q. B. D. 92, was wrongly decided, how does it bear upon this case? Not in the least. Nor indeed does the case of *Hoare v. Rennie*, 5 H. & N. 19, which, in my opinion, was decided upon the considerations which I have mentioned, and which I think should be supported.

LORD FITZGERALD. My Lords, I concur.

*Orders appealed from affirmed, and appeal dismissed with costs.*¹

NORRINGTON v. WRIGHT AND OTHERS.

SUPREME COURT OF THE UNITED STATES, JANUARY 20, 21 — OCTOBER 26, 1885.

[Reported in 115 *United States*, 188.]

THIS was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract: —

¹ A portion of the opinions of the Lord Chancellor and Lord Blackburn, relating to the effect of section 10 of the Judicature act of 1875 on the winding up of companies, has been omitted.

Non-payment for one instalment of goods under circumstances justifying the seller in believing the remainder of the contract would not be performed, was held to justify the seller in refusing further delivery in *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars (\$45.00) per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

EDWARD J. ETTING, Metal Broker.

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July, shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs at the rate of about 1,000 tons a month in March, April, May, June, and July. The defendants pleaded non-assumpsit. The material facts proved at the trial were as follows:—

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and, in answer to a letter from him of May 16, wrote him on May 17 as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated

quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is, then, the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18 Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month. As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19, the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months clause is to secure the completion of whatever has fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required."

"You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule, and its uncertainty of application."

On June 10 Etting offered to the defendants the alternative of delivering to them 1,000 tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15 Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended: 1st. That under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month. 2d. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Mr. *Samuel Dickson* and Mr. *J. C. Bullitt*, for plaintiff in error.

Mr. *Richard C. McMurtrie*, for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court. After stating the facts in the language reported above, he continued:—

In the contracts of merchants, time is of the essence.¹ The time of

¹ *Bowes v. Shand*, 2 App. Cas. 455; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Camden Iron Works v. Fox*, 34 Fed. Rep. 200; *Cromwell v. Wilkinson*, 13 Ind.

shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. *Mersey Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer in a certain mill, — in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and

365; *New Bedford Copper Co. v. Southard*, 95 Me. 209; *Salmon v. Boykin*, 66 Md. 541; *Crane v. Wilson*, 105 Mich. 554; *Redlands Assoc. v. Gorman*, 76 Mo. App. 184; *Denton v. McInnis*, 85 Mo. App. 542; *Booth v. Rolling Mill Co.*, 60 N. Y. 487; *Higgins v. Delaware, &c. R. R. Co.*, 60 N. Y. 553; *Blossom v. Shotter*, 59 Hun, 481, *aff'd* without opinion, 128 N. Y. 679; *Sun Publishing Co. v. Minnesota Type Foundry Co.*, 22 Oreg. 49; *Goff v. Pacific Coast S. S. Co.*, 9 Wash. 386, *acc.* Compare *Woolfe v. Horne*, 2 Q. B. D. 355; *Re Canadian Niagara Power Co.*, 30 Ont. 185; *Kauffman & Raeder*, 108 Fed. Rep. 171.

governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

Brawley v. United States, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part; and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Rennie*, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped

from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 H. & N. 28. So in *Coddington v. Paleologo*, L. R. 2 Ex. 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson v. Crippin*, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence*, 1 Q. B. D. 344, in which the contract was for the purchase of 4,500 quarters, ten per cent more or less, of Russian oats, "shipment by steamer or steamers during February;" or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. D. 470; 2 Q. B. D. 112; 2 App. Cas. 455.

In that case two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast, for this port, during the months of March ^{and} April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,080 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. (The nonfulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled;)" pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in

question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfilment of the contract;" pp. 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown, not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In *Reuter v. Sala*, 4 C. P. D. 289, under a contract for the sale of "about twenty-five tons (more or less) black pepper, October ^{and} or November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck v. Muller*, 7 Q. B. D. 92, under a contract for the sale of 2,000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one third in December and one third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeal, in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr*, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'Delivery, 1,000 tons monthly, commencing January next;' and as to the time of payment, 'Payment nett cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie*, and *Honck v. Muller*, above cited, yet in the House of Lords, *Simpson v. Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck v. Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes v. Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*.

In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82, which approves and follows *Hoare v. Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine*, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee*, 77 Penn. St. 228, and in *Scott v. Kittanning Coal Co.* 89 Penn. St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it; and in the other by having accepted, paid for, and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester v. Newton*, 2 Allen, 492, resembles that of the House of Lords in *Mersey Co. v. Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required, prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.

Judgment affirmed.

¹ *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Johnson v. Allen*, 78 Ala. 387; *Koebling v. Lock Stitch Fence Co.*, 28 Ill. App. 184; *Ballman v. Burt*, 61 Md. 415; *Robson v. Bohn*, 27 Minn. 333; *Smith v. Keith Coal Co.*, 36 Mo. App. 567; *Pope v. Porter*, 102 N. Y. 366; *King Philip Mills v. Slater*, 12 R. I. 82; *Providence Coal Co. v. Cox*, 19 R. I. 380, *acc.*; *Blackburn v. Reilly*, 47 N. J. L. 290; *Gerli v. Poidebard Silk Co.*, 57 N. J. L. 432, *contra*. See also *Norris v. Harris*, 15 Cal. 256; *Herzog v. Purdy*, 119 Cal. 99; *Myer v. Wheeler*, 65 Iowa, 390.

RUGG & BRYAN v. MOORE.

PENNSYLVANIA SUPREME COURT, MAY 21, 1885.

[Reported in 110 *Pennsylvania State*, 236.]

ERROR to the Court of Common Pleas of Lancaster County. Of July Term, 1885, No. 1.

Assumpsit, by John H. Moore against the firm of Rugg & Bryan, to recover damages for a breach of contract.

On the trial, before Livingston, P. J., it appeared that in July, 1879, the defendants, who were grain dealers in Peoria, Illinois, through their agent in Lancaster, sold to the plaintiff six car-loads of corn at a certain price per bushel, to be delivered on cars at Landisville. On August 16th, the first car arrived, and also two drafts. Plaintiff paid the first draft, and wrote asking why the remaining cars did not arrive. On August 21st a second car arrived, and about the same time a letter from defendants stated that all the grain was shipped, and called for payment.

Plaintiff got the corn from the second car from the station agent without presentation of the bill of lading, and refused to pay the draft until the four remaining cars should be heard from. When defendants heard of this refusal to pay they at once notified plaintiff that they rescinded the contract.

Plaintiff finally paid the draft through the station agent, and sued for the failure to deliver the four car-loads.

Plaintiff testified at the trial that the corn was all to be delivered within two weeks, the cars to be a day or two apart, so that it could be conveniently unloaded, and that he had a right to inspect the same before paying the draft.

Defendants' witness, Clark, testified that the sale was of six car-loads, and that the same were to be paid for at a fixed rate per bushel on delivery by means of the acceptance and payment of a sight draft; that there was no agreement that plaintiff should have the privilege of inspecting the corn before payment. "My instructions were to sell on sight draft, and I so sold it."

There was some testimony that the defendants understood that plaintiff was only to have two car-loads.

The defendants presented the following point:—

"If the jury believe that Rugg & Bryan's agent at Lancaster had no authority to sell corn in any other way than upon 'sight draft with bill of lading attached,' and John H. Moore, the plaintiff, refused to honor or accept a sight draft of Rugg & Bryan, the defendants, for any of this corn, the verdict must be for the defendants." Answer: Refused. (Fourth assignment of error.):—

The court charged the jury *inter alia*, as follows:

“They shipped two car-loads of corn to Mr. Moore, or rather shipped here in their own name, with orders to notify Mr. Moore, and sent a sight draft for the amount of each, attached to the bill of lading, to bank; their action in so doing would seem to indicate that they understood the contract as plaintiff and Mr. Clark says it was made, as to manner of shipment, payment by sight drafts, prices, etc. Those two car-loads were received by Mr. Moore and they have been paid for, so we have nothing to do with them in this case. (Third assignment of error.) . . .

“If the jury from the evidence find the contract to have been as stated in the testimony of the defendants, and made with Moore by defendants, through their agent, it was an entire contract, and defendants were bound to furnish and deliver the corn before demanding pay, and if they failed so to do they would be liable in damages to plaintiff if he suffered loss.

“If the jury find, from the whole evidence, that there was a contract made by defendants, through their agent, with plaintiff for the sale to him of six car-loads of corn, to be delivered to plaintiff at Landisville, at different times, and the consideration or money for it was apportioned, or to be paid on each item or car-load, and not entire and single, it was a severable contract, and refusal to honor one draft would not rescind it, and plaintiff would be entitled to recover for a breach of it.”

(Fifth assignment of error.)

Verdict and judgment for plaintiff. Defendants then took this writ assigning for error, *inter alia*, the refusal of these points and the portion of the charge as above set forth.

Eugene G. Smith and *A. J. Steinman*, for plaintiffs in error.

H. M. North (*E. D. North* with him), for defendant in error.

Mr. JUSTICE GREEN delivered the opinion of the court, October 5th, 1885.

This case comes before us in an unsatisfactory manner. The theory of the defence was that the contract was for the sale and delivery of six car-loads of corn to be paid for at a price per bushel on the delivery of each car-load, by means of the acceptance and payment of a sight draft for each car-load. There was evidence in support of this theory, the most ~~precise and~~ persuasive of which came from the plaintiff on the witness stand, and from his act of accepting and paying the draft drawn for the first car-load. He also said the price was to be by the bushel, and named the amount, 45½ cents for yellow, and 45¼ for mixed, and the defendants' witness concurred that the price was to be by the bushel, but did not name the price.

The chief complaint of the defendants is, that under the charge of the court, they had no hearing before the jury on their theory of defence, and a careful examination of the charge appears to sustain the complaint. This is partly the fault of the defendants, because they might have exhibited their theory in a point expressing it intelligibly, and asked the instructions of the court, but they did not do so. The only

point they did present mingled a question of the authority of the agent with a refusal of the plaintiff to accept any draft, and asked a peremptory instruction for a verdict upon those two matters only, when they alone would not necessarily result in a verdict for the defendants, even if found as stated in the point; that would depend upon other facts not expressed or provided for in the point. We cannot say therefore that there was error in the mere refusal to affirm the point in the terms in which it was propounded.

But in other respects we think the charge tended to mislead the jury, and for that reason the case must be reversed. Thus, the learned judge said in his charge: "If the jury, from the evidence, find the contract to have been as stated in the testimony of the defendants, and made with Moore by the defendants through their agent, it was an entire contract, and defendants were bound to furnish and deliver the corn before demanding pay, and if they failed so to do they would be liable in damages if he suffered loss. If the jury find from the whole evidence that there was a contract made by defendants through their agent, with plaintiff for the sale to him of six car-loads of corn to be delivered to plaintiff at Landisville at different times, and the consideration or money for it was apportioned or to be paid on each item or car-load, and not entire or single, it was a severable contract, and refusal to honor one draft would not rescind it, and plaintiff would be entitled to recover for a breach of it." According to this, the plaintiff was entitled to recover in any event, whether the contract was entire or severable, and the only discretion which the jury had was to assess the damages. Nor did it matter under this language what breaches had been committed by the plaintiff. If he had refused to pay for the corn already delivered he could, nevertheless, require the defendant to continue delivering, if the contract was entire; and if it was severable the failure of the plaintiff to perform his part of each item of the contract did not authorize the defendants to decline performing all the items of the contract on their part; and if they did so decline the plaintiff could mulct them in damages for so acting. We do not think this was a correct view either of the facts of the case or of the rights and duties of the parties. It does not seem to us that the contract between these parties was an entire contract in any view of the testimony. No witness for the defendants or for the plaintiff testified that the corn was all to be delivered before the price was to be paid, or that the sale was a sale in bulk, the whole consideration being an entirety and to be paid at one time. In *Lucesco Oil Co. v. Brewer*, 16 P. F. S. 351, we held that whether a contract was severable or entire depended upon the character of the consideration, thus: "It is the consideration to be paid and not the subject or thing to be performed that determines the class to which a contract belongs. Its entirety or separableness depends, not upon the singleness of its subject or the multiplicity of the items composing it, but upon the entirety of the consideration, or its express or implied apportionment to the several items constituting its subject. If the consideration is

single the contract is entire, whatever the number or variety of the items embraced in its subject; but if the consideration is apportioned expressly or impliedly to each of these items the contract is severable." As the defendants' witness, Clark, testified that he sold six car-loads, deliverable at different times, and payable at a price per bushel by drafts at sight, there was an entire absence of an express agreement that the whole price of all the car-loads was to be paid at one time, and after the delivery of the entire quantity, and a strong inference that drafts at sight were to be payable whenever drawn and at each delivery. It was error, therefore, for the learned court below to say absolutely that if the defendants' testimony was believed the contract was entire. The question as to the character of the contract should have been submitted to the jury upon all the evidence, and then they would have considered it upon the testimony both of the plaintiff and the defendants, and viewed in this manner they could not, consistently with the evidence, have found an entire contract.

Then they should have been told that if it was the contract of the parties that the corn was to be paid for at each delivery, whether one car or more, and the plaintiff refused to pay for a delivery which had been accepted by him, without some sufficient reason for such refusal, he thereby authorized the defendants to rescind, and if within a reasonable time thereafter they exercised their right of rescission, the contract was at an end, and the plaintiff could not recover. This view is expressed with reference to the state of the evidence exhibited upon the present record. Whether a contract when severable is of such a character that one party may refuse to perform his part as to one of the terms, and nevertheless require the other party to continue full performance of his part of each term upon peril of damages for non-performance, is a much vexed question upon which neither the English nor the American courts are agreed, and as to which it is not easy to state a uniform rule. In this State we have held that where a contract consisted of several entirely distinct and independent parts, each of which could be performed without reference to the others, a failure of one of the parties to perform one of the terms did not authorize the other to rescind the whole contract and refuse performance of the other terms by the party in default in the first instance, when such further performance was subsequently tendered. *Morgan v. McKee*, 27 P. F. S., 228. But in this case there were eight separate contracts, each for the delivery of 500 barrels of oil at fixed times and a specified price. The action was on three of them by the seller against the buyer for refusing to accept after default in a delivery, and the question arose on a rejected offer to prove that the contract was entire for 4,000 barrels, that the first four deliveries were accepted and paid for, that the fifth delivery was defaulted by the seller, and that when the next delivery was tendered by the seller the buyer gave notice of an election to rescind on account of the previous month's default, and declined acceptance of either that or the subsequent deliveries. We held that the offer could

not be received because it contradicted the written contracts by parol testimony, because each delivery was the subject of an independent agreement, the breach of which would authorize a recoupment in damages, but not a rescission of the other contracts, and because the right of rescission was not exercised within a reasonable time. The case is not parallel with the present, and contains no element which determines it. Nor is the case of *Scott v. Kittaning Coal Co.*, 8 Norr. 231, any more in point. There the action was by the seller against the buyer for not taking, or not calling for, a large part of an entire lot of 50,000 tons of coal to be delivered on monthly calls by the buyer, of 6,000 tons each, after having taken 18,000 tons which were called for and delivered, but not in exact accordance with the contract. The defendants contended that inferior coal was delivered among the 18,000 tons, and that they were thereby defrauded and authorized to rescind the contract as to the remainder on that account. But we held that while they might have refused to accept the inferior coal, they had in fact accepted it and sold it, and therefore could not rescind the contract because they could not restore the inferior coal, and had never notified plaintiffs of their intent to rescind. The case does not raise the question which is presented in this. The case of *Reybold and Voorhees*, 6 Cas. 116, is more closely analogous both in its facts and in the character of the question determined. The action was brought by the buyer against the seller for damages for not delivering peaches under a contract to deliver the seller's entire crop and receive weekly payments for all peaches delivered during each week. The buyer defaulted in his payment for the first week. The seller continued to deliver on the Monday following, but receiving no payment he on Tuesday stopped his deliveries. The buyer on the next day offered to pay, and asked to have the deliveries continued, which the seller refused, and thereupon the action was brought.

Lowrie, C. J., in speaking of the rights and duties of the parties in these circumstances, said: "The plaintiffs broke their contract by not paying up on Saturday, and the defendant had a right then to rescind it and seek another market. He continued another day to execute it on his side and again the plaintiffs failed. Then he rescinded, and a day or two afterward the plaintiffs came and were willing to pay. We think they were too late. To relieve them would be to change their contract without cause, which we cannot do." Other courts have held similar doctrine in similar circumstances, as in *Bradley v. King*, 44 Ill. 339; *Dwinel v. Howard*, 30 Me. 258; *Stephenson v. Cady*, 117 Mass. 6; *Haines v. Tucker*, 50 N. H. 307; *The King Philip Mills v. Slater*, 12 R. I. 82. In the case at bar, it does not appear that particular times of delivery were fixed, nor the quantity of each delivery. But it does appear in the testimony of both parties that payments were to be made when deliveries were made.

The defendants' witness said the corn was to be paid for on sight drafts, but did not say at what times or for what quantities of corn they

were to be drawn. The plaintiff said drafts were sent with bill of lading attached, and he paid the first and refused to pay the second, because he wanted to see whether the defendants had shipped or would ship all the corn. This was not a sufficient reason for refusing to pay after he had accepted and received the corn. If then the contract required payments on deliveries, and the plaintiff wilfully refused payment according to the contract, he thereby authorized defendants to rescind at their option.

The defendants did give notice of rescission at once if payment was not made of the draft for the last delivery, and it was not. We think this right of rescission was exercised within a reasonable time. We sustain the third and fifth assignments.

*Judgment reversed and venire de novo awarded.*¹

GEORGE CAHEN, RESPONDENT, v. JOHN R. PLATT ET AL.,
APPELLANTS.

NEW YORK COURT OF APPEALS, APRIL 9-17, 1877.

[Reported in 69 New York, 348.]

APPEAL from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 8 J. & S. 483.)

This action was brought to recover damages for the alleged breach of a contract of purchase and sale.

¹ Hull Coal Co. v. Empire Coal Co., 113 Fed. Rep. (C. C. A.) 256; Stakes v. Baars, 18 Fla. 656; Branch v. Palmer, 65 Ga. 210; Savannah Ice Co. v. American Transit Co., 110 Ga. 142; Bradley v. King, 44 Ill. 339; Hess v. Dawson, 149 Ill. 138; Curtis v. Gibney, 59 Md. 131; McGrath v. Gegner, 77 Md. 331; Baltimore v. Schaub, 54 Atl. Rep. (Md.) 106; Palmer v. Breen, 34 Minn. 39; Berthold v. St. Louis Construction Co., 165 Mo. 280; Gardner v. Clark, 21 N. Y. 399; Kokomo Co. v. Inman, 134 N. Y. 92; American Broom Co. v. Addickes, 42 N. Y. Supp. 871; Johnson v. Tyng, 43 N. Y. Supp. 435; Reybold v. Voorhees, 30 Pa. 116; Easton v. Jones, 193 Pa. 147, acc. See also Raabe v. Squier, 148 N. Y. 81.

Monarch Cycle Co. v. Royer Wheel Co., 105 Fed. Rep. 324; West v. Bechtel, 125 Mich. 144; Blackburn v. Reilly, 47 N. J. L. 290; Otis v. Adams, 56 N. J. L. 38, contra. See also Johnson Forge Co. v. Leonard (Del.), 57 L. R. A. 225; Winchester v. Newton, 2 Allen, 492; Beatty v. Howe Lumber Co., 77 Minn. 272; Trotter v. Heckecher, 40 N. J. Eq. 612; Lucasco Oil Co., v. Brewer, 66 Pa. 351; Tucker v. Billings, 3 Utah, 82.

Non-payment of an instalment under a building contract or similar contract has been held to justify cessation of work. Phillips Co. v. Seymour, 91 U. S. 646; Cox v. McLaughlin, 54 Cal. 605; Dobbins v. Higgins, 78 Ill. 440; Keeler v. Clifford, 165 Ill. 544; Geary v. Bangs, 37 Ill. App. 301; Shute v. Hennessy, 40 Iowa, 352; McCullough v. Baker, 47 Mo. 401; Bean v. Miller, 69 Mo. 384; Mugan v. Regan, 48 Mo. App. 461; Graf v. Cunningham, 109 N. Y. 369; Thomas v. Stewart, 132 N. Y. 580; Miller v. Sullivan, 33 S. W. Rep. (Tex. Civ. App.) 695; Bennett v. Shaughnessy, 6 Utah, 273; Preble v. Bottom, 27 Vt. 249. See also Rioux v. Ryegate Brick Co., 72 Vt. 148.

Campbell v. McLeod, 24 Nova Scotia, 66, contra.

The facts appear sufficiently in the opinion.

Wm. P. Chambers, for the appellants.

Jno. E. Parsons, for the respondent.

EARL, J. In September, 1872, at the city of New York, the plaintiff sold to the defendants 10,000 boxes of glass, at seven and one-half per cent discount from the tariff price of July, 1872, to be paid for in gold, at New York upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November, and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants 4,924 boxes of glass, for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counterclaim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was, therefore, such a breach of contract as entitled the plaintiff to recover such legal damages as he sustained by the breach.

All concur.

*Judgment reversed.*¹

¹ A portion of the opinion, relating to the measure of damages, is omitted.

A necessary condition precedent.

PLINY CADWELL AND ANOTHER v. EZEKIEL BLAKE AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1856.

[Reported in 6 Gray, 402.]

ACTION OF CONTRACT, commenced on the 5th of April, 1854, by the assignees in insolvency of David Ames and John Ames, upon an agreement in writing made by the latter with the defendants on the 26th of January, 1853.

The following are the material parts of that agreement: "The said D. & J. Ames hereby sell to the said Blake & Valentine all the right, title, and interest which the said D. & J. Ames have in the machinery and fixtures now at their paper-mill at Chicopee Falls. They also agree that said Blake & Valentine shall have the right which said D. & J. Ames have to manufacture white paper, made from straw and other materials; which right has been assigned to said D. & J. Ames by Jean Theodore Coupier and Marie Amadee Charles Millier, and as described in the application of said D. & J. Ames for letters-patent of the United States. They also agree to instruct the said Blake & Valentine fully in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and to communicate to them from time to time all the improvements which they, the said D. & J. Ames, shall make in said art, and give them the benefit thereof; which instructions the said Blake & Valentine are to keep secret, so far as secrecy can be preserved consistently with their business."

"The said Blake & Valentine are to pay for said machinery and fixtures four thousand dollars, in four equal annual payments, with annual interest from date. Payment is to be made in paper, manufactured according to the process above mentioned, at the market price of such paper at the time when each payment shall become due, the paper to be delivered at the Western Railroad freight depot in Springfield. They also agree to take possession of said machinery and fixtures by the fourth of July next, and proceed as soon as may be with the manufacture; and to pay to said D. & J. Ames for the right to manufacture said white paper a certain share of the profits, if the profits exceed two cents a pound; otherwise nothing.

"If any dispute or disagreement shall arise between the parties in regard to the estimate of the profits, it shall be referred to three disinterested men, one to be chosen by each party, and the third by the two referees, and the award shall be binding on the parties."

"If the said D. & J. Ames shall, upon request, refuse to teach the said Blake & Valentine the art of making said paper as above mentioned, they shall forfeit, as liquidated damages, distinct from all the other liabilities under this contract, the sum of four thousand dollars."

The declaration set forth the agreement, and averred that David Ames and John Ames delivered said machinery and fixtures to the defendants according to the terms thereof, and the defendants accepted and received the same; that the defendants owed the plaintiffs therefor the sum of one thousand dollars with interest, and also the interest due on four thousand dollars, as therein stipulated; and that the plaintiffs had been ready to receive the paper therein specified, yet the defendants had not delivered the same, but had refused so to do.

ANSWER, 1st. That the defendants entered into said agreement upon the consideration and for the purpose of securing the right to manufacture white paper from straw by the process therein named, and of obtaining the necessary instructions in said art and mystery; that D. & J. Ames and the plaintiffs had failed to fulfil their contract in this behalf, and had neglected and refused to secure to the defendants the right to manufacture according to said process, and to instruct them in the art and mystery thereof, although repeatedly requested by the defendants so to do, and had prevented the defendants from using said process. 2d. That there had been a failure of consideration for the contract on their part; that said machinery and fixtures were of no value to them without said instructions and said right to manufacture; and they had offered to return them. 3d. That D. & J. Ames were not the proprietors of said right to manufacture, and had not at the time, nor obtained since, any effectual assignment thereof, or any right to contract with the defendants therefor; or else had failed to avail themselves of such assignment, and had abandoned, lost, and suffered themselves to be deprived of the right to use said process, and of the patent issued therefor; whereby their agreement to give the defendants such right had been defeated, and the defendants prevented from using said process and from manufacturing said paper. 4th. That the defendants, by such failure to secure to them said right and to give them such instructions, had been prevented from fulfilling the agreement on their part. 5th. That D. & J. Ames were requested to teach the defendants the art and mystery of making said paper according to said process, but neglected and refused so to do, and thereby incurred a forfeiture under said agreement of the sum of four thousand dollars as liquidated damages; which the defendants claimed the right to apply to offset and cancel all claims of the plaintiffs under the agreement.

At the trial in this court the defendants admitted the execution of the agreement, and the delivery to them of possession of the paper-mill, machinery, and fixtures about the 1st of March, 1853. The plaintiffs then rested their case.

The defendants contended that the plaintiffs were not entitled to recover, without proving "1st. That D. & J. Ames had such an assignment of the right as their contract states: 2d. That they had availed themselves of it, and made it effectual to secure to themselves the

patent, or at least a right to manufacture under it for themselves and the defendants; 3. That they had conveyed or secured to the defendants the right to use the process; 4th. That they had instructed the defendants in the art of making said paper."

The plaintiffs denied that it was necessary for them to offer any further evidence, or that any of the matters alleged in the answer constituted a good defence to the action.

Bigelow, J., ruled that the plaintiffs had made out a *prima facie* case, and would be entitled to a verdict unless the defendants went forward and offered evidence of the matters set out in their answers; and reported the case for the determination of the full Court upon these two questions: 1st. The correctness of his ruling as to the sufficiency of the case as presented by the plaintiffs; 2d. The sufficiency of the grounds of defence set forth in the answer; a new trial to be had if upon either of these points, the opinion of the Court should be in favor of the defendants.

The arguments and decision upon this report were had at the last September term.

W. G. Bates and *J. Wells*, for the defendants.

F. Chamberlin, for the plaintiffs, cited *Boone v. Eyre*, 2 H. Bl. 273, note; *Stavers v. Curling*, 3 Bing. N. C. 355; *Campbell v. Jones*, 6 T. R. 572; *Lloyd v. Jewell*, 1 Greenl. 356; *Knapp v. Lee*, 3 Pick. 452; *Platt on Cov.* 90, 106; *Knight v. New England Worsted Co.*, 2 Cush. 271; *Townsend v. Wells*, 3 Day, 327; *Couch v. Ingersoll*, 2 Pick. 300; *Pordage v. Cole*, 1 Saund. 320, and note 4; *Franklin v. Miller*, 4 Ad. & El. 599.

SHAW, C. J. No question arises in the present case as to the pleading; the declaration is perhaps sufficient, under the new practice act, to enable the plaintiffs to recover, inasmuch as it does briefly aver the performance on the part of D. & J. Ames, and the plaintiffs, their assignees in insolvency, of all things on their part by the terms of the contract to be performed. But it is a question of proof: did the plaintiffs offer sufficient proof of performance on their part to enable them to recover? This again depends on the construction of the contract, and whether, according to its true interpretation, the stipulation for the payment of \$4,000 and interest, in paper to be manufactured by the process contemplated by the contract, was independent, and to be performed absolutely by such payment; or was it dependent and conditional, and to be performed only on condition that certain other things should be first performed on the part of the said D. & J. Ames?

The contract consists of several articles on both sides, is expressed in terms somewhat brief, and it is not easy to gather from it the full and clear intent of the parties. The great purpose of the contract seems to have been for D. & J. Ames to transfer to the defendants a right, a useful and beneficial right, to manufacture and sell white paper in so cheap a manner and in such quantities as to yield a profit, which right D. & J. Ames had acquired so far as it could be acquired by assignment

before patent, and of which they were expecting to become the patentees by a patent to be regularly issued by the competent authority of the United States. The particular right is no otherwise specifically described and identified than as a right which had been assigned to them by Coupier & Millier, and as described in the application of D. & J. Ames for letters-patent. It manifestly looked to the expectation that D. & J. Ames were to be the patentees, because they were the assignees and had applied for a patent, and because they stipulated to extend to the defendants all the benefit of the improvements which they should make.

In construing a mutual agreement, in which there are several stipulations on both sides, the question, whether one is absolute and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done, to decide correctly the order in which they are to be done.

It is contended that, as the machinery and fixtures were to become the property of the defendants at once, at a fixed price of \$4,000, payable at a certain time, they were to pay for them at all events, whether the manufacture of paper by the new process should go on or not. There would be more force in this argument if it appeared that the fixtures and machinery thus sold were adapted to the general purposes of paper-making, and had a market value, independently of the new process, and especially if the time for making the payment had been fixed at a time before the acts to be done on the other side.

But in this case, for aught that appears, the machinery and fixtures would be of little value except for manufacturing by the new process. And possibly the defendants may have stipulated to pay a sum greater than their value for these articles, in consideration of the advantages expected from the whole contract.

The stipulation, that the price of the machinery and fixtures should be paid at a fixed time, affords no criterion for determining that the stipulation is independent; because there was ample time before the first payment for D. & J. Ames to transfer the machinery, afford all the necessary instruction, execute and deliver a license conveying to the purchasers a right to manufacture, and do all other acts relied on as conditions precedent.

But the strong ground on which the Court are of opinion that these acts of D. & J. Ames were conditions precedent is, that these payments were to be made by a delivery of paper, to be manufactured by this new process from straw and other materials, at the then market value. This process is recognized and represented in the contract itself as an art and mystery, to be kept secret as far as practicable, not yet patented, and of which, therefore, there was no specification in the patent-office, from which the process could be learned. The machinery sold may

have been that of the inventors, adapted to the making of paper by this process.

It seems to us that these two stipulations, to deliver the machinery and to give the instruction, stand upon the same footing, because both were necessary to the making of paper by this process. The stipulation to instruct in the art and mystery was absolute and affirmative, like that to deliver the machinery, not dependent on request. There was a distinct stipulation, that if they should refuse to instruct on request, they should be liable to liquidated damages; but it has a distinct object, and does not supersede the other.

Without instruction in this art and mystery, the defendants might not know the method of preparing the straw and using the machinery; without these, this kind of paper could not be made, it could have no market-price, the defendants could not make it, and of course could not deliver it.

When in the order of events the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment, sufficiently distant to have the work done in the mean time. Suppose B. agrees to build at his own shop a carriage for A., of A.'s materials; A. stipulates seasonably to furnish materials, and to pay B. in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A. is a condition precedent. Without it B. cannot perform. He must build it of A.'s materials. Even building it of his own would not be a performance. B. has his shop, his tools, and his workmen all ready, but A. does not furnish the materials. If B. sues A., averring readiness to perform, he may recover. But if A. sues B. for not building the carriage, it would be a good answer that A. himself had not furnished the materials; because, whatever else the contract may contain, this is in its nature a condition precedent.

The Court are therefore of opinion that the plaintiffs, as a part of their own case, should not only have averred, but should have offered proof at the trial, that D. & J. Ames gave full and ample and reasonable instruction to the defendants, or — (which is of the same legal effect in matters of contract for doing specific acts) — that they tendered and offered such instruction in regard to the preparation of the material and the use of the machinery, to enable them to make the paper in the manner and of the material proposed, which the defendants declined receiving.

The Court are also inclined to the opinion that the legal effect of the stipulation of D. & J. Ames with the defendants was, that they should have a full right to manufacture paper by the process therein indicated, whatever the nature of the right then was or might become by the obtaining of a patent, which it appears by the contract they expected to obtain, or in failure of such patent, such right as they should hold

from the assignment to them by Coupier & Millier. They were embarking in a new and expensive enterprise; and should another person obtain a patent, which might happen, they might be placed in a situation in which they could not carry on the manufacture without infringing the right of another. If the patent was obtained by D. & J. Ames, it seems to us that they should have tendered to the defendants an assignment of the patent, or at least a right under it; or that, if the application was still pending, or had been denied, and there was no patent, that fact should have been averred. But we have not placed our decision ordering a new trial mainly on that ground; but throw out the suggestion for the consideration of parties, should a new trial be had.

But there is another ground upon which the court are of opinion that a new trial ought to be had. (Perhaps both points reserved in the report depend substantially upon the same question of construction of this contract, namely, whether any of the stipulations of D. & J. Ames constituted conditions precedent; because, if they did, and so far as they did, and the defendants have averred the performance of them, they would, if proved by the defendants, as they offered to do, be a good defence. Upon looking at the answer, we think that, even if the plaintiffs had made out a *prima facie* case, several of the facts stated in the answer would have been competent for the defendants to prove; and, if proved, would have been available in defence, either by way of bar, or in reduction of damages. *New trial ordered.*)

The plaintiffs then amended their declaration by inserting an averment "that the said D. & J. Ames instructed the defendants in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and offered them further instructions if they should need it, and full examination of the premises of the said D. & J. Ames, and permission to take dimensions, and to be shown the use and application of whatever they might desire to inquire about, and to give them all needful information which they should require."

The defendants demurred to the declaration, for that it did not state a legal cause of action, substantially in accordance with the rules contained in the Statute of 1852, c. 812; "because it does not allege that the plaintiffs, or said D. & J. Ames, had secured to the defendants the right to manufacture paper by the process named in said contract, nor that the defendants have the right to manufacture according to the terms of the contract."

Bates and Wells, for the defendants.

R. A. Chapman and Chamberlin, for the plaintiffs.

SHAW, C. J. The Court are of opinion that this demurrer is well taken and must be sustained. It is true there is no warranty in terms of a right to manufacture paper by the process referred to; but we think such a warranty and condition results from the provisions of the contract, the whole of which must be taken together. D. & J. Ames agree that the defendants shall have the right to manufacture white paper

from straw and other materials, which right has been assigned to D. & J. Ames by Coupier and Millier. (It is not merely hypothetical, such right as they have, if they have any; but an express stipulation that they shall have the right, and an affirmative averment of the fact that it has been assigned to them, so that they have the power to assure it, with an intimation that the assignment is of such a character as to induce them to apply for a patent, which, if granted, would secure to them an exclusive right.) If they had such an assignment, whether they obtained a patent or not, it would prevent any other person from obtaining a patent so as to exclude them from the right. Such a stipulation, accompanied with such an express undertaking that they held such an assignment, amounted to a stipulation that no other person should have such right as to exclude them therefrom; and that, either by a grant of the patent-right from D. & J. Ames if they obtained one, or by common right if none should be obtained, the defendants should have the right to manufacture by this new and peculiar process. (When we consider that the whole object of the contract was to enable the defendants to manufacture by this process; that the consideration of the undertakings of the defendants was their right and power so to manufacture paper; that the debt was to be paid in paper thus to be manufactured; that without such right the machinery and fixtures might be of little value to them, and the teaching of an art they could not practise, without infringing the rights of others, wholly useless, the conclusion seems inevitable, that the enjoyment of a right to use this art and process, patented or unpatented, was regarded by the parties as a condition, without a performance of which on the part of D. & J. Ames, or those who claim under them, the defendants are not bound to make the stipulated payments.

Demurrer sustained.

VYSE v. WAKEFIELD.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson & Welsby, 442.]

COVENANT on an indenture, dated the 3d of March, 1827, whereby the defendant, in consideration of 8,100*l.*, bargained, sold, and assigned to the plaintiff certain dividends, interest, and annual produce, from time to time due and payable or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her; to have, hold, receive, and take the dividends, &c., thereby assigned unto the plaintiff, his executors, &c., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her; and the defendant did thereby for

himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, amongst other things, that he the defendant should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent or agents of any such office or offices in the county where he the defendant might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him the defendant; and he should not afterwards do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever, whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, amongst other things, appear. And the plaintiff says, that he the defendant, in part performance of his said covenant, did afterwards, to wit, on the 8th day of March, 1827, at the request of the plaintiff, appear at an office for the insurance of lives within London, that is to say, the office of a certain company of persons, or office established for the purpose and carrying on the trade or business of and for the insurance of lives, under the name of, and called and known by the name of, the Rock Life Assurance Company, and did then and there answer certain questions then asked and required of him touching and concerning his age and state of health, and did then do all other necessary acts in order to enable the plaintiff to insure the life of him the defendant in and with the said company or office, he the plaintiff then thinking proper and intending to insure the life of him the defendant in and with the said company or office, according to the course and practice of the said company or office; the answering such questions as aforesaid, and the said other matters in that behalf aforesaid, being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he the plaintiff did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office, by a certain policy or insurance, at and for the premium of 81*l.* 17*s.* 6*d.*, payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and satisfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of 3,000*l.*, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus

to that policy, subject to and under the condition or proviso, amongst others, that, in case the defendant should go beyond the limits of Europe, the same should be null and void; and the plaintiff says, that the said condition or proviso, at the time of making the said indenture and from thence hitherto, was and is usual and reasonable; and that although he the plaintiff has performed and observed every thing in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid, in this, to wit, that he the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he the plaintiff had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant, had amounted to a large sum, to wit, 2,000*l.*, and had become of great value to the plaintiff, to wit, the value of 2,000*l.*, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of 3,000*l.*, to wit, on the first day of June, 1838, he the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises the said policy became and was null and void, &c.

Special demurrer, assigning for cause that the declaration does not contain any *specific averment* that the defendant, before he went beyond the limits of Europe as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact, that the plaintiff had insured the life of the defendant as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the policy had been effected, and that it was subject to the condition or proviso stated in the declaration.

Peacock, in support of the demurrer, was stopped by the Court, who called upon

Cowling to support the declaration. The declaration is sufficient. It was not necessary to allege any notice to the defendant; for the declaration states that the defendant did, at the request of the plaintiff, appear at the Rock Life Assurance Office, and did answer certain questions put to him; and he might, therefore, have informed himself of the fact of the insurance having been effected, and of the terms and conditions of it. The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do; and here there is nothing in this covenant requiring him to give any notice. Therefore, unless the circumstances were such that the defendant had not any means of informing himself of it, no notice was necessary. This contract to insure is confined to insurance offices within the bills of mortality; and the defendant might readily have informed himself by

inquiry of the fact of the insurance having been effected, and of the terms and conditions of it. In Com. Dig. tit. Condition, L. 9, many instances are given where parties are not bound to give notice, but the other parties must take notice at their peril. It is there said, "If a condition, covenant, or promise, be to do an act to a stranger, or upon performance of an act by a stranger, there needs no notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A. marries, there needs no notice when A. marries. So if a condition, covenant, or promise be to do upon the performance of any certain and particular act by the obligee himself, he ought to do it without notice by the obligee that the act is performed, for he takes it upon him to do it at his peril; as if the condition be to pay so much when the obligee marries, there need not be notice of his marriage." Notice is not necessary, unless where the party expressly contracts to give notice, or where it must necessarily be implied that notice is to be given, because the obligor cannot know or ascertain from the nature of the thing whether the act has been done or not. In *Rex v. Holland*¹ it was held, that where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts, as he is presumed from his situation to know them. In answer to the objection of want of notice, Wood says, in the argument, "Notice here merely means knowledge; and when the matter is as much in the knowledge of the defendant, or more, than of any other person, the law presumes that he had knowledge;" (for which he cites 16 Vin. Abr. tit. Notice, p. 5, pl. 10, where it is said, "None is bound by the law to give notice to another of that which that other person may otherwise inform himself of;" and Lord Kenyon, in giving judgment, refers to that argument, and recognizes it as showing "the true grounds upon which notice is or is not required to be averred." So here, the defendant might have informed himself whether the insurance was effected or not, and was bound to do so at his peril; and the plaintiff not having undertaken by his contract to give the defendant notice that the assurance was effected, was not bound to do so. The defendant by his covenant undertakes to do nothing to vitiate an insurance effected with any person within the bills of mortality, without any stipulation whatever as to notice of the particular person with whom it should be effected. [PARKE, B. If the covenant had spoken of an insurance to be effected with A. B., there would be no necessity for notice; but if it were with any person that the plaintiff may choose, then it must surely be necessary that notice should be given. Is not notice equally necessary, when the covenant applies to an insurance in any one of the many public offices within the bills of mortality?] If five or six offices had been named, no notice would be necessary. If there are such a number of insurance offices in London as would render

¹ 5 T. R. 607.

it unreasonable to expect the defendant to inquire of them all whether such an insurance had been effected, the defendant should have shown that by his plea; not having done so, the Court will not assume it to be the fact. In *Doe v. Whitehead*,¹ which was an ejectment by landlord against tenant on an alleged forfeiture by breach of a covenant to insure "in some office in or near London," it was held that the omission to insure must be proved by the plaintiff. There the same objection would have applied, as it would have been necessary for the landlord to make inquiry at every office in or near London. Lord Denman, C. J., says, "The proof may be difficult, where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law; and the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the Court cannot assist him." Here the district is limited; but if the number of offices within it are so inconvenient as to render inquiry difficult, the Court cannot calculate the balance of inconvenience. Suppose all the insurance offices were in one street, no notice would surely in such case be necessary. [PARKE, B. Have you any authority for that, or in any case where there is any choice as to where the insurance shall be effected?] The cases cited in Com. Dig., before referred to, are applicable in principle: but there is no case where the party's having a choice as to the office in which an insurance is to be effected, had been held to render notice necessary. In *Viner's Abr.*, Condition (A. d.), pl. 15, it is said, "If A. sells to B. certain weys of barley or other things, and B. assumes to pay for every wey as much as he sells a wey for to any other man; if he after sells to others certain weys for a certain sum, he shall not have an action on the case against B. upon his promise till he hath given him notice for how much he sold the wey to others; for B. is not bound to pay it till notice, because it is uncertain and not known to him; and here he assumes in general and not in particular, *scilicet*, to pay so much as J. S. shall pay for a wey, and so he does not assume to take notice at his peril; "but," it is added in pl. 16, "if he had assumed to pay as much for every wey as he sold a wey for to J. S., if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril without any notice given, otherwise he hath broke his promise." If, in the present case, the number of offices had been limited, it is quite clear that notice would not have been necessary, because the Court cannot measure the inconvenience arising from a greater or less number; and the same argument will apply where the district is limited. The defendant might have remedied the inconvenience, if any inconvenience exists, by providing for it in his contract.

Peacock, in support of the demurrer. The principle established by the cases is, that where the act is to be done by a stranger no notice is

¹ 8 Ad. & Ell 571, 3 Nev. & Per. 557.

necessary, because the fact is as much within the knowledge of the one party as the other; (but where the act is to be done by the plaintiff himself, it is otherwise, and notice must be given.) *Powle v. Hagger*. There the Court expressly drew the distinction between the case where the act is to be done by a stranger, and where it is to be done by the plaintiff himself. [PARKE, B. In *Bradley v. Toder*, and in *Fletcher v. Pynsett*, where the promise was, in consideration that the plaintiff would marry such a woman the defendant would give him 100*l.*, it was held that notice of the marriage was not necessary.] In *Bradley v. Toder* the Court at first held that the declaration was not good, because it was not alleged that the plaintiff gave notice of the marriage; and though the Court afterwards resolved that it was good, the reason given is, that it was a necessary intendment; that when, after the marriage, he requested payment of the money, notice of the marriage was given. But this is an act which lies entirely within the knowledge of the plaintiff, who effected the policy and who alone could know the conditions annexed to it. [All the cases turn upon the question, whether the defendant had the means of knowledge or not; and if he had not, or not equally with the plaintiff, then notice is requisite.] [LORD ABINGER, C. B. Suppose the defendant had promised to pay 1,000*l.* to any banker in London that the plaintiff chose to open an account with, must not the plaintiff give him notice of the bank in which he has opened an account? PARKE, B. Suppose the covenant had been, that the defendant would perform the terms and conditions of any policy that the plaintiff had entered into with the Rock Life Assurance Company, he must in that case have made inquiry as to the terms upon which the policy was effected.] In — *v. Henning* it is said, “If the agreement be, that he shall pay so much as J. S. in particular paid, in that case, *quia constat de personâ*, and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice; but when the person is altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice.” In this case the plaintiff had the option of selecting any one of the insurance offices, and he was not confined with respect to the time of effecting the insurance; and he ought, therefore, to have given notice. [PARKE, B. Suppose it had been a promise to pay the plaintiff 100*l.* if he should go to Rome or Naples?] There it would be his duty to give notice. When the event depends upon the performance of one of two acts which are in the plaintiff’s option, he is bound to give notice, because it could only be known to the plaintiff when he had exercised his option. [PARKE, B. In *Haverley v. Leighton* the plaintiff promised J. S., that if he borrowed of one Powell 100*l.*, he would repay that sum to him upon the same day and upon the same conditions that they between them should agree upon, and it was there held that notice was not necessary.] That case shows that where the person or the act is certain, no notice is necessary; but when the person or the act is uncertain, and the option is to be exercised by the plaintiff, then it is necessary.

LORD ABINGER, C. B. I am of opinion that the defendant in this

case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality to ascertain whether such a policy had been effected, he would still be obliged to do something more, namely, to learn what were the particular conditions on which it was effected; because the covenant here is, not that the defendant shall not do any thing to evade the covenants or conditions usually prescribed by insurance offices, but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced; i. e., he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from the conditions in general use might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

PARKE, B. My mind is not entirely free from doubt: but I am inclined, on the whole, to agree with the Lord Chief Baron. The defendant here is sued on a covenant by which he stipulates to do two things, namely, to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that

this is confined to an insurance to be effected at the particular office at which he should appear; the words "such insurance" in this covenant meaning simply an insurance on his life. (The defendant is bound in the first instance to appear at an insurance office, and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the stipulations which have been entered into by the policy.) The question then is, whether an action can be maintained on this covenant, when notice of the effecting such insurance, or of its terms, is not averred in the declaration. The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case of *Haule v. Hemming*,¹ where a man promised to pay for certain weys of barley as much as he sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases the right of the defendant to a notice before he can be called on to pay is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone (for there are some cases to that effect), or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at some office in London. (Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case, for not only do the terms of the covenant apply to all actually existing companies

¹ *Viner's Abr. "Condition"* (A. d.), pl. 15: *Cro. Jac.* 422

of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice, and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. (If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified, generally, to the defendant, that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature, and the conditions with which it was coupled; but I think that he was at least entitled to notice of the fact of its existence.

ALDERSON, B. I am of the same opinion; and my judgment is founded on the authority of *Haule v. Hemyng*, as reported in *Viner's Abr. Condition (A. d.)*, pl. 15. (In this case the defendant covenants that he will not do any act, deed, or thing, whereby any such insurance may be avoided or prejudiced.) The insurance is to be effected at any time or times, or at any office or offices, within certain limits, and is not confined to the then existing offices. The plaintiff has the selection from an indefinite number; and it seems to me that the person who is to select the office must give notice of his having done so. If the defendant had received notice that an insurance was effected in the *Rock Life Insurance Company*, I by no means say that he would not be bound to inform himself of any conditions to which it might be subject.

ROLFE, B. I am of the same opinion. I own that when the case was first opened, my impression was in favor of the plaintiff; (and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not.) Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so where a party contracts to do a particular act; for then it is his own fault for entering into such a contract. In the progress of the argument, my opinion changed; and I think that the plaintiff was bound to give notice. I find it stated in *Viner's Abr. Condition (A. d.)*, pl. 10, "If I am bound to enfeoff such persons as the obligee shall name, he ought to give notice of those he names, otherwise I am not bound to

enfeoff them;" and reason seems in favor of this principle of law. The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of that option having been exercised.

*Judgment for the defendant.*¹

MAKIN v. WATKINSON.

IN THE EXCHEQUER, NOVEMBER 22, 1870.

[Reported in *Law Reports*, 6 *Exchequer*, 25.]

DECLARATION upon a covenant contained in a lease of a mill, and other buildings, with machinery and fixtures, by which the lessors (of whom the defendant was one) covenanted with the plaintiff (the lessee), that they would, at all times, during the demise, at their own expense, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition; alleging performance of conditions precedent, and a default in repairing, whereby, &c.

Plea: That the plaintiff gave no notice to the lessors of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition.

Demurrer and joinder.

Wills was called upon to support the plea. The only direct authority for the plea is a *dictum* of Mansfield, C. J., and Gibbs, J., in *Moore v. Clarke*,² that "the lessor may charge the lessee without notice, for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary." The justice of this is the more obvious if its principle is applied to a similar case, that of a watch-maker selling a watch, with an agreement to keep it in repair for six months; it is plain that he could not be sued for non-repair unless the buyer required repairs to be done. The lessor, in the one case, and the watch-maker in the other, not only would not, but could not, know that repairs were wanted unless notice was given; for they would have no right to insist upon examining the premises or the watch, and would be guilty of a trespass, if they did so against the will of the possessor. The *dictum* above cited is supported by several analogous cases. In *Com. Dig. Condition*, L. 10, it is laid down that "if a condition be that the lessee repair, and that the lessor find timber, the lessee ought to demand timber, and give notice how much will

¹ Affirmed on error, 7 M. & W. 126. And see *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Spooner v. Baxter*, 16 Pick. 409; *Becket v. Gridley*, 67 Minn. 37; *McLean v. Republic Ins. Co.*, 3 Lans. 421; *Genesee College v. Dodge*, 26 N. Y. 213.

² 5 Taunt. at p. 96

be sufficient." [BRAMWELL, B., referred to L. 8, "if a condition, covenant, or promise, be to pay as much for goods as every other pays; the obligee shall give notice how much another pays."] In Vin. Abr. Condition (A. d.), pll. 18, 38, it is laid down that when the condition is an act to be performed by a stranger, the obligor must take notice at his peril; but in the case cited in the latter *placitum* (Pollen v. Kingesmeal, as stated in the margin), and in Harris v. Ferrand, reported in Hardr. 41, and cited in Vin. Ab. Notice, A. 2, pl. 12, the principle is more fully and more correctly stated that "notice is not necessary where the thing lies as much in the cognizance of the one as the other, but where it lies more properly in the cognizance of the plaintiff than of the defendant notice is necessary." That principle was acted upon in Vyse v. Wakefield, and is entirely applicable to this case. [MARTIN, B. A distinction has always been made between a condition and a covenant. CHANNELL, B. The principle has been laid down, that where notice or demand is merely formal, the bringing of the action is sufficient notice, but not otherwise.] Here the notice is essential; if the lessor is to have no notice, extensive repairs may have been executed by the tenant, of which the lessor knows nothing, and of the necessity of which he has, after they are done, no means of judging, but for which he may be compelled to pay; and he may be made liable for consequential damage which he had no opportunity of preventing. [BRAMWELL, B. The case would be different if the covenant were, on the making of the lease, to put in repair. But the plaintiff's contention would reduce the lessor to a dilemma; if he went on the premises to repair, and repairs were not needed, he would be liable to be sued in trespass; if he did not go and repairs were needed, he would be liable for consequential damage, and he could have no knowledge whether they were or were not needed.]

Kemplay, in support of the demurrer. If the defendant is right, there is no difference between a covenant to repair and a covenant to repair on notice. The rule is, that notice is not necessary unless it is stipulated for by the contract; see 1 Wms. Saund. 116, note to Cutler v. Southern, and 2 Wms. Saund. 62, n. (4), where all the authorities are collected; Cole's Case. [BRAMWELL, B. The covenant in Cole's Case was to save harmless, but if it had been merely to indemnify, must not notice have been given of the damnification?] [The defendant's view cannot be sustained without adding words to the covenant, and there is no authority for such addition.] [BRAMWELL, B. Words were added in Vyse v. Wakefield. The question is, whether in reason the covenant does not require the addition; we must construe it if possible as a covenant made by reasonable people.] It is not necessary for that purpose to add words; there is nothing unreasonable in it as it stands; the lessor being under an obligation to repair would have an implied license to do all things necessary. The *dictum* in Moore v. Clarke, was not necessary to the case; on the other hand, Coward v. Gregory¹ is in

¹ Law Rep. 2 C. P. 153.

favor of the plaintiff. [BRAMWELL, B. There the covenant was to put the premises in repair, which implied they were out of repair.]

CHANNELL, B. I am of opinion that this is a good plea. The declaration is good, because it avers the performance of conditions precedent, which would include a request if a request is necessary. The question is, whether the plea denying the giving of notice is a good defence. I agree that the case of *Moore v. Clarke* is not an authority; because, although what was said there upon this point was said by two very eminent judges, one of them (Gibbs, J.) peculiarly conversant with pleading, and was illustrative of the matter under discussion, yet it was not necessary to the determination of the case. We must, therefore, look at the question apart from direct authority, and upon general principles. And, looking at it in this way, *Vyse v. Wakefield* is to some extent an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied.

Now here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might by observation acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of *Vyse v. Wakefield*, we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good.

BRAMWELL, B. I am also of opinion that the plea is good. To hold it to be so, we must hold the defendant's covenant to be a covenant to repair on notice. [I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor: "You shall not come on the premises without lawful cause;" and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed, he will be a tres-

passer; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested.

As to the authorities, we have, in the first place, an *obiter dictum* of two eminent judges, which was appropriate to the matter in hand, and is therefore of great value, though not binding. The authorities on analogous cases, collected in Comyns' Digest, are by no means clear; some seem one way, some another; and one, which occurs under the title Condition, L. 9, is very much in favor of the plaintiff. The case there referred to is *Fletcher v. Pynsett*,¹ where, it appears, the defendant covenanted with the plaintiff that, if he would marry the defendant's daughter, the defendant would assure to him a certain copyhold; and it was held that the plaintiff was entitled to sue without giving notice of the marriage. It seems to be suggested that, when the engagement is conditional upon the doing of an act by a third person, notice must be taken from that person. But this cannot be the reason of the rule; for in a case put under L. 8 of the title I have referred to, it is said that a promise to pay as much for goods as any other pays requires a notice of how much another pays.² But there seems no reason why the obligee should be less bound to give notice, or the obligor more bound to take notice, of the act of a stranger than of the act of the obligee himself, as in some of the cases put in L. 9, where it is said notice is not necessary.

If we look to the reason of the rule, it is that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

To have inserted a provision in the covenant, requiring notice, would certainly have been very reasonable. When it is a question of putting it into the covenant by implication, one must needs, as in all such cases, have great doubt; but upon the whole, looking to the authorities, and bearing in mind what is said in *Moore v. Clark*, I think we are warranted in so reading the covenant.

¹ Cro. Jac. 102; see to same effect, Roll. Abr. Cond. C. 1, 2, 3, 4, under the heading "At what time performance should be when no time is limited."

² *Holmes v. Twist*, the case there referred to, was decided by the Exchequer Chamber, reversing the judgment of the King's Bench, some judges of the court below, agreeing with the judgment of reversal (Hob. 51); the reason there assigned was, that the price was "a thing of his (the plaintiff's) private knowledge, and not like the case of bond to perform the award;" in Cro. Jac. 432, where the same case is referred to in a similar case of — *v. Henning* (Haul v. Hemmings, in 1 Roll. Rep. 385), it is said a difference was taken "if the agreement be that he shall pay so much as J. S. in particular paid; in that case *quia constat de personâ*, and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice." The latter reason seems to be adopted by Parke, B., in *Vyse v. Wakefield* (6 M. & W. at pp. 453, 454), as the *ratio decidendi* of these cases.

MARTIN, B. I am of opinion that this plea is bad. I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty. Now the declaration states a covenant by the defendant to keep in good and substantial repair, and that the defendant did not keep in repair. In answer to this the plea alleges that there was no notice of want of repair. I think this plea bad, and for the simplest reason, that no such stipulation is contained in the covenant, nor any thing from which such a stipulation can be inferred.

I cannot perceive that the covenant as it stands is so unreasonable as is alleged. Moreover, there are in leases covenants to repair generally, and covenants to repair on notice; but if this covenant is construed in the way proposed, it is idle to require notice in terms; the one covenant will do as well as the other.

The authorities appear to me directly against the plea. The proposition laid down by Mr. Cowling *arguendo* in *Vyse v. Wakefield* is, I apprehend, perfectly correct. "The general rule is that a party is not bound to do more than the terms of his contract oblige him to do;" and all the judgments support what he says. Lord Abinger, C. B., says: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it." Now, the assumption in the present case that the defendant cannot know without notice is, in my judgment, idle. PARKE, B., says: "The general rule is that a party is not entitled to notice unless he has stipulated for it; but," he adds, "there are certain cases where, from the nature of the transaction, the law requires notice to be given, though not expressly stipulated for;" he proceeds to describe those cases as cases where the thing to be performed is indefinite, and at the option of the plaintiff; and he decides the case before him on the ground that an option still remained to be exercised by the plaintiff. The present transaction is not of such a nature. Lastly, Rolfe, B., says: "I own that when the case was first opened my impression was in favor of the plaintiff; and for this reason, that when a party enters into a contract he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so when a party contracts to do a particular act, for then it is his own fault for entering into such a contract." I entirely agree with the rule of law so stated, and therefore think we are not at liberty to import any such stipulation into this covenant as the defendant claims.

*Judgment for the defendant.*¹

¹ *L. & S. W. Railway Co. v. Flower*, 1 C. P. D. 77; *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507; *Thomas v. Kingsland*, 12 Dal., 315; *Sinton v. Butler*, 40 Ohio St. 158. *acc.*

HUGALL v. MCLEAN.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, MAY 1, 1885.

[Reported in 53 *Law Times Reports*, 94.]

THIS was an action to recover a sum of £63 as damages for an alleged breach of an agreement to keep the drains and sewers of a house in tenantable repair.

The defendant, who was receiver in an administration action, let a house to the plaintiff for three years from August, 1882, by an agreement by which the defendant agreed to execute the "repairs to the roof, main walls, main timbers, drains, and sewers, which are to be kept in good tenantable repair and condition by the receiver during the tenancy."

On the 18th June, 1883, while the plaintiff was in occupation under the agreement, the basement of the house was flooded with sewage in consequence of the defective condition of the drains. The plaintiff thereupon sent for a sanitary engineer and instructed him to put the drains into a proper state of repair. On the 22d Sept., 1883, after the repairs had been executed, the plaintiff wrote to the defendant complaining of the expense to which she had been put, and asking whether she should send him the bill for the repairs. This was the first notice which the defendant received that the basement of the house had been flooded.

At the trial the jury found that the plaintiff did not know, and had not the means of knowing, that the drains were in a defective condition before the 18th June, 1883. They also found that the defendant did not know that the drains were in a defective condition before that date, but they found that he had the means of knowing.

Upon these findings Wills, J., gave judgment for the defendant.

The plaintiff appealed.

Lewis Coward, for the plaintiff.

Fullarton, for the defendant.

BRETT, M. R. The terms of the agreement in the present case are substantially the same as those of the covenant in *Makin v. Watkinson*, 23 L. T. Rep. n. s. 592; L. R. 6 Ex. 25; and as those of the act of Parliament in *The London and Southwestern Railway Company v. Flower*, 33 L. T. Rep. n. s. 687; 1 C. P. Div. 77, and therefore I am of opinion that we must give the agreement the same interpretation as was given in those cases. It is the case of an agreement drawn in the form of a common covenant in a lease, and the meaning of such a covenant was settled by a decision given nearly fifteen years ago (*Makin v. Watkinson*, *ubi sup.*); that decision has been followed in other cases, and no doubt many covenants in leases have been drawn on the faith of the

interpretation placed on the covenant in that case. This being so, I think that, even if we disagreed with the view adopted in *Makin v. Watkinson*, we should still be bound to give the same interpretation to the agreement in this case; but in my opinion it is impossible to doubt that the reasons for the interpretation placed on the covenant in *Makin v. Watkinson* are unanswerable. We must look at the implication which the judges made in that case, and which will be found at the end of the judgment of Channell, B., where he says: "We ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good." L. R. 6 Ex. at page 28. This shows that we must imply this condition as if it were written into the agreement; and if this is so the tenant must take care that the landlord has notice of the defective state of repair. I doubt whether, if the landlord had notice *aliunde* he would be liable, but it is not necessary to decide this. If he were told by a neighbor that the premises were out of repair it might happen that he would be unable to enter. Here the landlord, according to the finding of the jury, had the means of notice of the want of repair; but this does not help the plaintiff so as to enable her to treat the landlord as if he had had actual notice. It is clear that on such an agreement the landlord is not liable until he has had notice.

BAGGALLAY and BOWEN, L. JJ., concurred.

Appeal dismissed.

ASHLEY HAYDEN v. WILLIAM BRADLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1856.

[Reported in 6 Gray, 425.]

ACTION OF CONTRACT to recover damages for the defendant's failure to keep in repair the buildings included in a lease from the defendant to the plaintiff of a hotel and farm in Southwick, by which the defendant covenanted to "put the buildings and fences on, around, and about the premises in a good condition, and so to maintain them for and during the term of" the lease, and the plaintiff covenanted "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent, or make or suffer any strip or waste thereof."

At the trial in the Court of Common Pleas the defendant, who resided in Springfield, contended that he was not liable, under his covenant, for damages arising from want of repair, after the plaintiff had entered into the occupation of the premises under the lease, and before notice to the defendant of such want of repair. But Mellen, C. J., instructed the jury that "for defects in the buildings, occurring after the commencement of the lease, the plaintiff was entitled to recover damages for such want of repair from the time such defects occurred;

necessary condition.

time when...

it being the duty of the defendant, under this lease, to take notice of such defects or want of repair, and prevent damage to the plaintiff by repairing the same, without notice from the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. Vose, for the defendant.

W. G. Bates, for the plaintiff.

METCALF, J. The established rule of law, which the court are now to apply, is rightly stated by Lord Abinger in *Vyse v. Wakefield*, 6 M. & W. 452, 453. It is this: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice. See *Smith v. Goffe*, 2 Ld. Raym. 1126, and 11 Mod. 48; 1 Saund. Pl. & Ev. (2d ed.) 214; System of Pleading, 126, 127; Lawes Pl. in Assump. (Amer. ed.) 176 *et seq.*¹

But if the defendant's agreement to maintain the buildings in good condition were not of itself sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation by the defendant of a right of entry upon the premises "to view and make improvements." He, therefore, having provided for himself the means of ascertaining the contingency upon which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened. *Keys v. Powell*, 2 A. K. Marsh. 254.

Exceptions overruled.

EBENEZER HUNT v. EDWARD ST. LOE LIVERMORE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL TERM, 1828.

[Reported in 5 Pickering, 396.]

ASSUMPSIT on a promissory note from the defendant to the plaintiff, not negotiable, dated February 26, 1823, for \$1,400, payable on demand.

¹ In *Hutchinson v. Cummings*, 156 Mass. 329, 330, the court said in regard to an agreement to repair, "Assuming in favor of the plaintiff that this agreement bound the defendants to make all necessary repairs while Mrs. Dennin continued to occupy, it must be implied that they were only to make repairs upon reasonable notice."

At the trial before Morton, J., the plaintiff called a witness, who testified that on the 2d of December, 1824, the plaintiff demanded of the defendant payment of the note, or a return of the bond hereafter mentioned; but that the defendant did not pay the note, nor return the bond, but replied that what is written is written.

The defendant then gave in evidence a bond from the plaintiff, dated February 26, 1823, conditioned that the plaintiff, upon the defendant's paying him the sum of \$1,400, should make and execute to the defendant a good and valid warranty deed of certain land which the defendant had agreed to purchase of the plaintiff for the sum mentioned.

The defendant also produced the following receipt, signed by the plaintiff: "February 26, 1823. Received of E. S. Livermore a note of hand for \$1,400, for which I have this day given him a bond for a deed of a certain piece of land: but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering up said bond."

The defendant contended that the plaintiff was not entitled to his action before he had tendered a deed of the estate described in the bond, and that the defendant now had a right to rescind the contract referred to in the bond and receipt, and to return the bond to the plaintiff, which he offered to do in Court. But the judge, being of opinion that these facts did not amount to a defence against the note, directed the defendant to be called. If the whole Court should be of a different opinion, the default was to be taken off and the plaintiff to become nonsuit.

Livermore and Hoar, for the defendant. The three writings, bearing the same date and relating to the same subject-matter, are to be considered as one transaction, and they show a promise by the defendant to pay, provided the condition of the bond is performed. If the bargain was not carried into effect, the note was to be given up. The plaintiff therefore should have performed his part of the contract, or at least have tendered a deed of the land as a condition precedent to bringing an action on the note. *Collins v. Gibbs*, 2 Burr. 899; *Thorpe v. Thorpe*, 1 Ld. Raym. 662; s. c. 1 Salk. 171; *Pordage v. Cole*, 1 Wms. Saund. 320, note 4.

The note was a *nudum pactum*. No consideration was given for it: and, independent of that objection, it is not recoverable, for when the land was to be conveyed the money was to be paid; so that whether the bargain for the land should be carried into effect or rescinded, the note was to be given up. It was in fact a nullity.

Stearns, contra. It is manifest, on the face of the papers, that giving the receipt was an after transaction. The payment of the consideration is a condition precedent to giving a deed, but the note is unqualified in its terms, and being on demand might have been sued immediately.

But if the several writings were one transaction, they do not constitute a defence against the note. If there was a mutual right to rescind,

It was not without a limitation as to time, and nearly two years had elapsed before payment of the note was demanded; which allowed the defendant more than a reasonable time to make his election. Bothy's case, 6 Co. 81; Pothier on Obligations, No. 205.

The opinion of the Court was drawn up by

PUTNAM, J. We think that the note, the receipt, and the bond should be construed as if they were parts of one contract.

The plaintiff on his part agreed to convey the land to the defendant when he should pay the purchase-money, and the defendant agreed to pay the purchase-money when the plaintiff should convey the land. As no time for the conveyance or for the payment is mentioned, the law supplies the deficiency by providing that the contract should be executed in a reasonable time. And an offer to do what the contract required of either party, and a demand and refusal of the other to do what was required of him, would entitle the party so offering to perform to a remedy upon the contract. It is clear to our minds, that the contract is to be construed as containing dependent stipulations. Neither party intended to trust to the personal security of the other. If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase-money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement.

If the stipulation contained in the receipt of the plaintiff to deliver up the note upon the defendant's delivering up the bond, "provided the bargain is not carried into effect," were to be construed to give either party an election at his own pleasure to annul the contract, it is evident that the contract could never be carried into effect against him who should please to avoid it. It would, in effect, have no binding operation. It would not be what the civil law defines, "juris vinculum quo necessitate adstringimur." "It is of the essence of all agreements which consist of promising something, that they should produce an obligation in the party making the promise to discharge it; hence it follows that nothing can be more contradictory to such an obligation than the entire liberty of the party making the promise to perform it or not as he may please." Pothier on Oblig. No. 47, 48. The case at bar strongly illustrates that position. If it were that either party had the entire liberty of vacating it, the contract would be void for want of obligation. It would stand thus: Hunt engages to convey his land to Livermore for \$1,400, if Hunt shall please to do so; and Livermore engages to pay \$1,400 for the land, if he shall please to do so. We cannot suppose the parties intended to make such a vain bargain. We are satis

hed that it was a valid contract, containing dependent stipulations to be performed by each before he could compel a performance by the other. It follows, therefore, that the plaintiff was not entitled to the money or price of the land, inasmuch as he neglected to offer to convey the land by a proper deed.

We are all of opinion that the default should be taken off, and that the plaintiff should be nonsuited.¹

BEECHER v. CONRADT.

NEW YORK COURT OF APPEALS, SEPTEMBER TERM, 1855.

[Reported in 3 Kernan, 108.]

See case the title

ACTION commenced in the Supreme Court, in 1851, to recover the amount agreed to be paid by the defendant in and by the contract hereinafter mentioned. The complaint alleged the making of the contract; that it had been duly transferred to the plaintiff; that the party of the first part to the contract and the plaintiff had always fulfilled and kept all things therein contained on their part to be performed; that the defendant had neglected to pay the amount agreed to be paid by him; and that the whole amount of the principal and interest named in the contract was due and unpaid, and judgment for this amount was demanded. The answer put all the allegations of the complaint in issue. The cause was tried at the Oneida County Circuit, held by Mr. Justice Gridley. The plaintiff read in evidence the contract mentioned in the complaint. It was dated the third day of January, 1839, and executed by Abraham Varick, as surviving executor of the will of one Walker, deceased, as party of the first part, and by the defendant as party of the second part. By the terms of this contract the party of the first part, in consideration of one cent to him paid, and "upon the express condition that the party of the second part shall and do well and faithfully perform the covenants hereinafter mentioned, and to be performed on his part," covenanted for himself and his assigns to execute and deliver to the party of the second part a deed of conveyance in fee, containing covenants of warranty against the acts of the grantor, of and for a parcel of land which was de-

¹ Smith v. Henry, 7 Ark. 207; Sorrells v. McHenry, 38 Ark. 127, 134; Perry v. Quackenbush, 105 Cal. 299; Tyler v. Young, 3 Ill. 444; Thompson v. Shoemaker, 68 Ill. 256, 259; Duncan v. Charles, 5 Ill. 561; Headly v. Shaw, 39 Ill. 354; Weiss v. Binnian, 178 Ill. 241; Bowles v. Newby, 2 Blackf. 364; Cunningham v. Gwinn, 4 Blackf. 341; McCulloch v. Dawson, 1 Ind. 413; Hickman v. Rayl, 55 Ind. 551; Zebley v. Sears, 38 Iowa, 507; Little v. Thurston, 58 Me. 86; Smith v. Boston & Maine R. R., 6 Allen, 262; Fort Payne Co. & Iron Co. v. Webster, 163 Mass. 134; Siglin v. Frost, 173 Mass. 284; Sutton v. Beckwith, 68 Mich. 303; Powell v. Newell, 59 Minn. 406; Peques v. Mosby, 15 Miss. 340; Divine v. Divine, 58 Barb. 264; Hoag v. Parr, 13 Hun, 95; Ewing v. Wightman, 167 N. Y. 107; Shelly v. Mikkelsen, 5 N. Dak. 22; First Nat. Bank v. Spear, 12 S. Dak. 108; Chandler v. Marsh,

scribed in the contract; and the defendant, the party of the second part, covenanted to pay to the party of the first part or his assigns "the sum of three hundred and ninety-six dollars in five equal annual payments, with interest annually on all sums unpaid." The plaintiff further proved that the land mentioned in the contract was conveyed and the contract assigned to him in December, 1850, and rested. Thereupon the counsel for the defendant moved the court to nonsuit the plaintiff, on the ground, among others, that inasmuch as the action was brought to recover the whole amount of the purchase-money after the same had become due by the contract, the plaintiff could not recover without proving that he tendered a conveyance of the land, or offered to convey the same to the defendant before the commencement of the action. The Court overruled the objection, refused to nonsuit the plaintiff, and decided that he was entitled to recover the amount of the purchase-money mentioned in the contract. The counsel for the defendant excepted. The judgment rendered at the circuit was affirmed by the Supreme Court at a General Term, held in the Fifth District. The defendant appealed to this court.

Samuel Beardsley, for the appellant.

Charles A. Mann, for the respondent.

GARDINER, C. J. The plaintiff has neither averred nor was there proof of any other breach of the contract upon the part of the defendant, except the non-payment of the purchase-money. The plaintiff had a right to sue for each instalment as they severally became payable; but this right he has waived, and now seeks to recover the whole purchase-money in this action, without an averment or proof of a tender of a conveyance or a readiness or willingness to convey. [It is not denied by the court below that, if the several payments had been made as they fell due, and the suit had been commenced for the last instalment alone, the plaintiff must have made such an averment and sustained it by proof, if questioned; the point is too plain to admit of discussion.] It is, however, said that a right of action accrued as the instalments became payable, which the non-performance of the plaintiff would not discharge. This doctrine assumes a right, upon the part of the plaintiff, to divide his cause of action into as many suits as

4 Vt. 88, *acc.* See also *Duncan v. Clements*, 17 Ark. 279; *Faust v. Jones*, 23 Ark. 323; *Falvey v. Woolner*, 71 N. Y. App. Div. 331.

Moggridge v. Jones, 14 East, 486; *Spiller v. Westlake*, 2 B. & Ad. 155; *Hageman v. Sharkey*, 2 Miss. 277; *Gibson v. Newman*, 2 Miss. 349; *Hazlip v. Noland*, 14 Miss. 294; *Snyder v. Murdock*, 51 Mo. 175; *Lewis v. McMillen*, 41 Barb. 420, *contra*. See also *Tronson v. Colby University*, 9 N. Dak. 559.

In many of the cases cited above it is not clearly brought out whether the court intended to decide that the plaintiff must show affirmatively as part of his case payment by him of his obligation, but this was decided in the following cases: *Newsome v. Williams*, 27 Ark. 632, 635; *Cunningham v. Gwinn*, 4 Blackf. 341; *Summers v. Sleeth*, 45 Ind. 598; *Hatfield v. Miller*, 123 Ind. 463, 466; *School District v. Rogers*, 8 Iowa, 316; *Ewing v. Wightman*, 167 N. Y. 107; *Withers v. Atkinson*, 1 Watts, 236, 246. In Maine, it has been held, however, that though default in payment by the plaintiff is a defence, such default must be shown by the defendant. *Manning v. Brown*, 10 Me. 49; *Niles v. Phinney*, 90 Me. 122.

there were instalments. The first answer to this suggestion is, that the consideration for the conveyance by the vendor was an entire sum, to be paid by instalments; that the whole was due at the commencement of the action, and the plaintiff has sued for the whole purchase-money without attempting to distinguish, in his complaint or evidence, between the different instalments. The second answer is, that the plaintiff having elected to wait until the fifth and last instalment became due, and upon the payment of which, as this case stands, the defendant would be entitled to a deed, cannot now sustain his action for either instalment without proof of performance or readiness to perform on his part. The covenants, as to the four first instalments, were originally independent; but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money which formed the consideration for his conveyance. The defendant, by a tender of the whole, which he has now a right to pay, would be entitled to his deed. The plaintiff on the other hand must establish his right to the consideration as an entirety, or he cannot recover any thing. If he recovered in this action but \$50, the judgment would be a complete bar to any further claim for the purchase-money, and when that judgment was paid the defendant would be entitled to his deed.¹

The defendant could not protect himself against an action by an offer to pay the first, or all of the four first instalments; as the consideration was entire, and all due, the plaintiff could insist upon the whole. And yet, if because the covenants were originally independent they must always continue so, the defendant must have the right to discharge by payments what the plaintiff could enforce by action.

The truth is, the parties by lapse of time are in the same situation as though the purchase-money was all payable at one time. The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his deed, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration. The condition attaches to the whole debt and every part of it. The judgment of the Supreme Court should be reversed, and a new trial ordered.²

¹ See *Barritt v. Belfy*, 47 Conn. 323; *Manton v. Gammon*, 7 Ill. App. 201; *Cockley v. Brucker*, 54 Ohio St. 214. Compare *Seed v. Johnston*, 63 N. Y. App. Div. 340; *McLaughlin v. Hill*, 6 Vt. 20. See *Herman on Estoppel*, §§ 220, *et seq.*

² *Hill v. Grigsby*, 35 Cal. 656; *McCroskey v. Ladd*, 96 Cal. 455; *Irwin v. Lee*, 34 Ind. 319; *Soper v. Gabe*, 55 Kan. 646; *Brentnall v. Marshall*, 10 Kan. App. 488; *Shelly v. Mikkelsen*, 5 N. Dak. 22; *Boyd v. McCullough*, 137 Pa. 7, 16; *First Nat. Bank v. Spear*, 12 S. Dak. 108; *Hogan v. Kyle*, 7 Wash. 595, *acc.* See also *McElwee v. Bridgeport Land Co.*, 54 Fed. Rep. (C. C. A.) 627.

Weaver v. Childress, 3 Stew. (Ala.) 361; *Hays v. Hall*, 4 Port. 374, 387; *White v. Beard*, 5 Port. 94, 100; *Duncan v. Charles*, 5 Ill. 561; *Sheeran v. Moses*, 84 Ill. 448; *Gray v. Meek*, 199 Ill. 136, 139; *Allen v. Sanders*, 7 B. Mon. 593; *Coleman v. Rowe*, 6 Miss. 460; *Clopton v. Bolton*, 23 Miss. 78; *McMath v. Johnson*, 41 Miss. 439; *Bowen v. Bailey*, 43 Miss. 405; *Biddle v. Coryell*, 3 Har. (N. J. L.) 377, *contra.* See also

DENIO, JOHNSON, MARVIN, and DEAN, JJ., concurred.

CRIPPEN, J. (dissenting). The first and fifth grounds on which the motion for a nonsuit was asked may properly be resolved into one, and considered together, as they both present the same identical question. If the plaintiff was bound to prove the tender of a deed, or an offer to give such a deed to the defendant as the contract called for, prior to bringing his action to recover the purchase-money, then he failed to maintain the action, and the Court in that event erred in refusing the nonsuit. In order to determine this question, it will be necessary to refer with care to the terms of the agreement between Varick, the trustee, and the defendant. By this contract Varick agreed to convey lot No. 3, in Walker's patent, on the condition of a full and faithful performance of all the covenants contained in the contract to be performed by the defendant. On the part of the defendant, the first covenant made by him was that he would pay the trustee, Mr. Varick, his heirs or assigns, the just and full sum of \$396 in five equal annual payments, with interest annually on all sums unpaid. The contract bears date on the third day of January, 1839; consequently, the last annual payment became due on the third day of January, 1844. This covenant of the defendant is not made to depend on any contingency or act of the other party, or on any condition to be found in the contract. When, then, let us inquire, did the defendant become entitled to the deed of said premises? The parties, by the plain language of the contract, have said that the defendant shall be entitled to such deed on the express condition that he shall pay the sum of \$396 in five equal annual payments, from the third day of January, 1839, with annual interest. It is not easy to mistake the meaning of parties, when they use language so plain and emphatic in making their contracts.

The defendant most clearly was not entitled to a deed when the first, second, third, or fourth instalments became due, even if they had been punctually paid by him. So, also, in relation to the last instalment, the time for its payment was fixed by the agreement; when the time arrived the money became due and payable from the defendant. No act was agreed to be performed on the part of the trustee or the plaintiff, as assignee of the contract, in order to entitle him to the money due on the last payment. The premises were to be conveyed on the express condition of the payment of the whole amount of the purchase-money.

Loud v. Pomona Land Co., 153 U. S. 564, 580; *Bean v. Atwater*, 4 Conn. 3; *White v. Atkins*, 8 Cush. 367; *Kettle v. Harvey*, 21 Vt. 301.

As to the effect in equity of a provision in the contract that payments which have been made shall be forfeited by failure to complete the purchase at the time named, see *Ames's Cas. Eq. Jur.* I. 338-341.

In regard to sales of personal property the English Sale of Goods Act provides: "Sec. 41, (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

"(b) Where the goods have been sold on credit, but the term of credit has expired." See further, *Chalmers, Sale of Goods Act* (5th ed.), 82; *Mechem on Sales*, § 1521.

No act whatever was agreed to be done by the trustee to entitle him to the money; or, in other words, the defendant agreed that he had no right to call for a conveyance, except upon the express condition that he paid the whole amount of the purchase-money. The case is clearly distinguishable from that of *Grant v. Johnson*, 1 Selden, 247. In that case the contract did not require the defendant to pay the whole amount of the purchase-money before obtaining a deed. He was entitled, by the terms of the agreement, to receive both the possession of the premises and a deed thereof before he could be called upon for the payment of the instalment in controversy in that action. Not so in the case at bar; and in this particular the cases are manifestly and clearly different. The defendant in this action had no right to ask for a deed, except upon the express condition that he first paid the full amount of the purchase-money. I have not been able to find any adjudged case conflicting with the plaintiff's right to recover in this action the amount due upon the contract.

The judgment should be affirmed.

HAND, J. (dissenting). I am of the opinion that the covenants to pay the purchase-money and to convey the land are independent. The defendant agreed to pay the purchase-money, and at certain specified times; and the vendor agreed to convey "upon the express condition" that he did so. No suit was commenced until all of the purchase-money became due. But that circumstance did not make the covenants dependent which before were independent. (Where the last payment and the conveyance are to be simultaneous acts, and the prior payments have not been made, in a suit for the purchase-money, a performance or an offer to perform is necessary. *Johnson v. Wygant*, 11 Wend. 48; *Grant v. Johnson*, 1 Seld. 247. But that is not this case as I understand this contract. The payment of all the purchase-money was a condition precedent to the right of the defendant to demand a conveyance. Having covenanted absolutely to pay certain sums at the expiration of certain fixed periods, and the vendor having promised a deed on condition that the payments were made, the clear intention of the parties must have been that payment of all the money should precede the conveyance. There was no duty for the vendor to perform until the vendee had performed all the covenants on his part. By inserting the word "condition" or "*sub conditions*," a condition is created. 10 Co. 42 a; 2 Bac. Abr., "Condition," (A.); Platt on Covenants, 72. "Upon condition" is an expression from which a condition precedent usually arises. (Platt on Covenants, *supra*.) The agreement here was not merely to convey "upon" payment being made, but "upon the express condition" that the vendee should perform; while the covenant to pay is without condition. And besides, the meaning of the words "upon condition" has been settled by construction, which should not be disturbed.

For this reason I think the judgment should be affirmed.

Judgment reversed.

CHARLES H. EDDY ET AL., APPELLANTS, v. ALVIN DAVIS,
RESPONDENT.

NEW YORK COURT OF APPEALS, JUNE 24—OCTOBER 8, 1889.

[Reported in 116 *New York*, 247.]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 4, 1886, which reversed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term and granted a new trial.

The action was brought to recover from defendant unpaid instalments alleged to be due upon a contract to purchase land.

By the contract, which was executed March 1, 1875, plaintiff agreed to sell to defendant a lot of land in the village of Westport, upon which there was a brick store, for the sum of \$1,600, payable in annual instalments varying from \$100 to \$200.

The contract provided that possession should be given on payment of the first instalment, and contained the following provisions: "The party of the second part (defendant) is to have one hundred feet depth of land including the store running east and west, running north and south the width of the store." "The said parties of the first part agree that on receiving the sum of eight hundred dollars at the time and manner above mentioned, they will execute and deliver to the said party of the second part, at their own proper cost and expense, a good and sufficient deed of said property by the party of the second part giving to the parties of the first part a bond and mortgage on said property for the remaining sum unpaid." "And the said party of the first part agrees to keep open a right of way back of said building." "It is understood that the party of the second part is to put up during the coming year a building on the east end of said store, to cost not less than six hundred dollars."

Defendant paid the first instalment under the contract, entered into possession and entered the building called for by the contract. He made other payments in amount about sufficient to pay the interest on the purchase-money. At the time of the commencement of the action two instalments, amounting to \$300, were not due. At the time the agreement was made the plaintiffs owned other property adjoining the lot sold defendant, on the north, and bounded on the west by the principal street of the village; and over this property access could be had from the street to the rear of defendant's lot.

In June, 1875, plaintiffs sold to one Joseph Hutchings all the rest of the property owned by them, without any reservation of a right of way to defendant's lot, and at the time of the commencement of this action they owned no property over which they could give a right of way to the rear of defendant's store.

Further facts appear in the opinion.

Richard L. Hand, for appellants.

Chester McLaughlin, for respondent.

BROWN, J. The trial court found, as conclusions of law, that the defendant "was not entitled to a conveyance of property, or of such right of way until the full sum of sixteen hundred dollars, the consideration provided by said contract, was paid, and that the provision in said contract for deeding the premises to the defendant, upon the payment of eight hundred dollars and interest, was for his (defendant's) benefit, and he could avail himself of it at his option, by paying such money at the times provided in the contract, and demanding a deed and tendering a bond and mortgage; not having paid or made such demand or tender, and having waived his right to make any claim under this provision, as appears in the sixth finding of fact, the contract was to be treated as if it had been omitted, and the action having been brought to recover instalments due, no tender of a deed by the plaintiffs was necessary to enable them to maintain this action."

The sixth finding of fact referred to was as follows: "That immediately before the commencement of this action the plaintiffs, by their attorneys, applied to said defendant and informed him that plaintiffs were ready and willing to perform said contract on their part, if he was ready to pay, to which defendant replied that he could not pay, and said he wanted to give up the property, and thereupon plaintiffs commenced this action."

It is undisputed that within two months after the defendant entered into possession of the property plaintiffs sold all their adjoining land, and thus put it out of their power to comply with their agreement with defendant, and keep open a right of way to the rear of his store; and at the time of the offer mentioned in the finding of fact I have quoted the plaintiffs were powerless to fulfil their agreement. The finding, therefore, that they were ready to perform, or that their offer and defendant's refusal constituted a waiver of tender of the deed cannot be sustained. A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an existing capacity to perform. *Nelson v. Plimpton Elevating Co.*, 55 N. Y. 484; *Lawrence v. Miller*, 86 id. 137; *Bigler v. Morgan*, 77 id. 318.

Here there was no existing capacity, as, having sold all the adjacent lands, plaintiffs could not perform their covenant "to keep open a right of way" back of defendant's store. (The conclusion of a waiver is not, therefore, sustained.) If, however, the construction put upon the contract by the learned trial court, in the conclusion of law I have quoted, is correct, then the finding of a waiver of tender of performance is unimportant.

Never having paid \$800 of the purchase-money, defendant was not in a position to demand the conveyance, and there being in the contract,

as construed by the trial court, no covenant on the part of the plaintiff to deliver the deed until the full consideration was paid, tender of the conveyance as a condition precedent to recover for unpaid instalments was not necessary, and no question as to the sufficiency of the facts to constitute a waiver of tender could legitimately arise.

Where a contract for the sale of land provides for partial payments of the purchase-money prior to the delivery of the deed, the vendor may sue for such instalments when due without tendering a conveyance. *Paine v. Brown*, 37 N. Y. 228; *Harrington v. Higgins*, 17 Wend. 876.

But when, after the instalments are all due, the vendor brings an action for the purchase-money, he is not entitled to recover without proving an offer before suit to convey the land to the defendant on receiving the purchase-price. When the last instalment falls due the payment of the whole of the unpaid purchase-money and the conveyance of the land become dependent acts. *Beecher v. Conradt*, 13 N. Y. 108.

And the same rule applies when an action is brought for any instalment payable at or after the term fixed for the delivery of the deed. *Grant v. Johnson*, 5 N. Y. 257; *Pordage v. Cole*, 1 Saund. 320b, Sergeant Williams' note. So that if the fair interpretation of the contract is, as was held by the trial court, that there was no obligation on plaintiffs' part to deliver a deed until the whole of the purchase-money was paid, except in case of a demand therefor by defendant after payment of \$800 and tender of a bond and mortgage for the balance of the purchase-price, then the judgment was right and must be affirmed.

We come, therefore, to the consideration of the question whether the learned trial judge was right in his construction of the contract that the provision for a delivery of the deed when \$800 was paid was one for the benefit of the defendant, enforceable only on his demand, or whether it was a covenant on the part of the plaintiffs to deliver the conveyance at the time named.

We can find no support for the construction adopted by the trial court in the agreement itself, and it is not based upon any finding of fact.

The construction is harsh, unfair, and unnecessary. The parties appear to have provided expressly for all matters between them. We expect naturally to find mutual obligations in the contract. The vendee agrees to pay the purchase-money, and we look for an agreement on the part of the vendor to convey. (If it is not contained in the clause of the contract under discussion, it does not exist in express terms, and we are forced to imply it from the nature of the instrument.)

In *Robb v. Montgomery*, 20 Johns. 15, cited by appellants, there was an express covenant to convey on payment of the purchase-money, and a further provision that if, after the first payment was made, defendant wished to get a deed, and to give a bond and mortgage for securing the two last payments, plaintiff would give a deed.

Thus the intent of the parties was clear that it was to be optional with the vendee whether he would take a deed on making the first payment.

Here there is no express covenant to give a deed at all, unless it is in the provision cited. The language used in this part of the contract does not express an option, but is that of a positive undertaking. It is: "Parties of the first part agree, on receiving the sum of eight hundred dollars, . . . that they will execute and deliver . . . a sufficient deed."

We think the intent of the parties is plainly inferable from the language used, that this was a covenant on plaintiff's part to convey at the time and under the circumstances mentioned.

We have, therefore, an action ~~to recover unpaid instalments~~ brought after the time stipulated for the delivery of the deed) and in such case, to entitle plaintiffs to recover, it was incumbent upon them to show an offer made before suit, to convey on receiving the stipulated part of the purchase-money. *Grant v. Johnson*, and *Beecher v. Conradt*, *supra*. The facts of this case are very similar to the cases cited. In *Grant v. Johnson* the contract was to sell the land for \$950; \$200 of which was payable in April, 1846, and \$200 in April, 1847, and the balance in two annual payments thereafter.

The seller was to give possession in November, 1845, and a deed in May, 1846. The action was for the instalment due in April, 1847, and this court held that delivery of the deed was a condition precedent to the payment of the second instalment, and having made no tender, plaintiff could not recover.

In *Beecher v. Conradt* the purchase-money was payable in five instalments. None were paid, and after they were all due plaintiff brought an action for the whole purchase-money. This court held that while the covenants as to the first four instalments were originally independent, when the last instalment fell due, conveyance and payment were dependent acts, and that no part of the purchase-money could be recovered without tender of a conveyance before commencement of the action. To the same effect are *Hoag v. Parr*, 13 Hun, 95; *James v. Burchell*, 82 N. Y. 108; *Smith v. McCluskey*, 45 Barb. 621. The determination of the question what are and what are not dependent covenants is not one free from difficulty, and many of the cases are so irreconcilable that they are studied with little profit or assistance to the judgment.

Each case must be determined by the cardinal rule of interpreting all contracts, viz., (to ascertain the intention of the parties to the agreement;) and here we think there is no doubt the intention was to deliver the deed of the property when \$800 of the purchase-money was paid. For all the instalments falling due prior to that time plaintiffs might have brought their action and recovered without proof of offer to convey, but having waited until after the time fixed for the delivery of the deed, payment and conveyance became dependent and concurrent acts, and tender of performance was essential on their part to an enforcement of defendant's obligations under the contract. The case seems to fall directly within the spirit of the second rule suggested by Sergeant Williams in his note to *Pordage v. Cole*, *supra*: "When a day is appointed for the payment of money, and the day is to happen after

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the thing which is the consideration is to be performed, no action for the money can be sustained without averring a performance ;" and the rights of the parties under such circumstances as exist in this case are clearly stated by Judge Gardner in *Beecher v. Conradt* as follows : " The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his dues, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." None of the cases cited by the appellant are in conflict with the rule stated, under the construction we have given the contract.

Robb v. Montgomery, 20 Johns. 15, in one respect, I think, must be erroneously reported. The case states that the declaration averred non-payment of all the instalments.

If we are to understand by this that the action was brought to recover the whole purchase-money, and to regard the court as holding that no tender of conveyance was necessary, then the case is in conflict with all the later authorities. But if the action was to recover the first instalment only, then the decision is intelligible. I think the action must have been for the first instalment. The case as reported arose upon a demurrer by defendant to a replication to a plea in the answer and involved the single question whether the assignment of the contract and the conveyance of the land to Bemus by the vendor, before the first instalment was due (Bemus being ready and willing and having the capacity to convey to defendant) was a bar to the recovery. The court held that it was not, and in so deciding is in harmony with later decisions, which hold that in an action by a vendor for an instalment of purchase-money falling due prior to the time limited for the delivery of the deed, want of title in the vendor is not a defence. *Harrington v. Higgins*, 17 Wend. 376.

These and all kindred cases will be found, I think, to have arisen on independent covenants in contracts, and the rule established by them has no application in an action by a vendor for purchase-money brought subsequent to the day stipulated for the delivery of the deed.

The appellant makes the point that the agreement to keep open the right of way was a personal covenant, having no relation to the title, and its violation furnished no excuse for refusal to pay the purchase-money.

The appellant is not in a position to raise such a question, being concluded by the finding of the trial court, that such right of way was necessary to the proper enjoyment of the store, and that the parties intended that defendant should have such way, and that it should be conveyed to him with the store : and we think a right of way, which the trial judge found to constitute in value one half of the property agreed to be sold, cannot be regarded as an immaterial part of the consideration of the defendant's obligation. Having put it out of their power to convey the property which they had agreed to sell, the plaintiffs were not able to

make a valid offer of performance, and hence not entitled to recover the unpaid purchase-money.

The order of the General Term was right and should be affirmed, and judgment absolute rendered for the defendant on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

EDWARD D. JAMES ET AL., APPELLANTS, v. JOHN J. BURCHELL, RESPONDENT.

NEW YORK COURT OF APPEALS, JUNE 17—SEPTEMBER 21, 1880.

[Reported in 82 New York, 106.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury. (Reported below, 7 Daly, 531.)

This action was brought to recover damages for the alleged failure of defendant to perform a contract.

On January 11, 1871, the parties entered into a contract by which the plaintiff, Sarah James, in consideration of one dollar, agreed "to sell and convey, or cause to be conveyed," as hereinafter stated, to the defendant four lots of land in the city of New York, for the sum of \$11,000 for each lot. It was further covenanted that the defendant should commence the erection of four houses upon the lots on or before February 10, 1871, and complete the same within seven months from that date; the plaintiffs to advance \$4,000 on each house to aid in its erection, and upon being paid and reimbursed the price of said lots and advances thereon, either in cash or the bonds of the defendant, secured by mortgages on the premises, then the plaintiffs agreed "to convey, or cause to be conveyed," the same to the defendant, in fee by a full covenant warranty deed free from all reasonable objections and from all incumbrances, except such incumbrances as should be made, or caused or suffered to be made, by the defendant; the latter agreed to complete the contract and to take title within eight months. The plaintiffs also covenanted that Sarah James was seized in her own right of a good title to said premises in fee simple. It was also agreed that the plaintiffs at their election might mortgage each of said lots to the amount of \$15,000, and convey the same subject to said mortgages in lieu of purchase-money for the same amount.

The court found that on the same day the contract was made plaintiffs conveyed the premises by warranty deed to Isaac B. Findull, subject to no incumbrances whatever. Defendant never entered into possession of the premises, but refused to erect the buildings because the plaintiffs could give no valid title to the property.

It appeared that some months after, but before the expiration of the eight months, Findull reconveyed to Mrs. James. Findull was a former clerk of James, and the conveyance to him was without consideration. He knew at the time he received the deed of the contract between the parties.

E. H. Benn, for appellants.

Osborn E. Bright, for respondent.

MILLER, J. The plaintiffs, in their contract with the defendant, covenanted that Sarah James, one of them, was seized in her own right of a good title to the premises in fee simple which were to be conveyed to the defendant; and it was further provided that the plaintiffs, if they so desire, could mortgage each of the lots to the amount of \$15,000. On the same day after the contract bears date, and when the parties acknowledged its execution, the plaintiffs conveyed the premises by warranty deed to one Findull, subject to no incumbrances whatever. The question presented is whether the plaintiffs had a right thus to impair the title, or in any other manner than by the mortgages provided for; and, as this conveyance was made to Findull, whether the plaintiffs had not violated the covenant, and the defendant was thereby released from any liability under the contract. The plaintiff's counsel insists that the fact that another person held the legal title for a portion of the intervening time, or that the defendant prior to the time fixed for taking title, was required by independent covenants to do certain acts and things toward the performance of the contract on his part, is immaterial. We think he is in error in this respect, and, under the provisions of the contract, the transfer of the title to Findull by the plaintiffs was important and material. By the contract, as will be seen by reference to the same, the defendant agreed to erect buildings upon the lots, of a certain style and quality, and of considerable value, within seven months from the date, the plaintiffs to advance money from time to time on each of such buildings. The lots were to be conveyed by the plaintiffs by warranty deed, free from incumbrances, except such as should be caused or suffered by the defendant, who was to take title and pay for the same within eight months from date. It is apparent from the terms of the contract that the defendant must have relied to a considerable extent upon the personal responsibility of the plaintiffs. Upon the faith of an existing and perfect title in Mrs. James, he was to take possession, erect valuable buildings, and expend large amounts of money. The covenant that Mrs. James was seized and the permission given to mortgage the premises was not only an inducement for the expenditure of \$60,000, to be made by the defendant, as the contract provided, (but a guarantee that no other incumbrances should be placed upon the property.) The covenant of seizin would be of no benefit if the plaintiffs could convey to a stranger without its violation, and compel the defendant to erect the buildings upon lands to which he might never acquire any title, and in that event to trust entirely to an action at law against the plaintiffs for reimbursement or indemnity. From the contract it is evident that the intention of the parties was that the defend-

ant should be protected in taking possession of the premises and in the erection of buildings thereon, and under the circumstances of the case that the title should remain unimpaired in Mrs. James until the conveyance was delivered. (Instead of this, on the very day the contract was acknowledged the plaintiffs conveyed the premises to Findull, who had been a clerk of Mr. James, and who took it in trust for Mrs. James and paid no consideration for the conveyance. They thus parted with all their right and title to the lot, and subjected the defendant to the hazard of losing what might be expended upon the same. As the testimony stood we think the defendant was not bound to proceed and complete the contract after the plaintiffs had parted with their title by a conveyance to a stranger.

(The conveyance by the plaintiffs and the execution of the mortgages by the defendant, according to the contract for the price of the lots and advances, were to be simultaneous acts.) In such a case the covenants are dependent, and there must be an existing capacity in the one who is to convey to give a good title. This distinction is stated fully by Spencer, J., in *Robb v. Montgomery*, 20 Johns. 15. The expenditure to be made, which was very large, should not, in view of the peculiar provisions of the contract, be regarded as an ordinary payment on account of the purchase-money, as the covenants were manifestly intended and must be considered as mutual and dependent. *Judson v. Wass*, 11 Johns. 525; *Tucker v. Woods*, 12 id. 190. We have carefully examined all the cases cited to sustain the proposition contended for by the plaintiffs' counsel, and we think that none of them uphold the doctrine that in a case presenting the characteristic features of the one at bar, a conveyance to a third party is not material.

(Some stress is laid by the appellants' counsel upon the provision in the contract that the plaintiffs agreed "to sell and convey, or cause to be conveyed.") This is not controlling; and taking the whole contract together, we think that the testimony shows that the defendant did not intend to accept any other warranty than that of the plaintiffs. (That Findull knew of the contract with the defendant at the time he took the deed, and therefore he took it subject to the rights of the defendant, and could have been compelled to convey, is not important, for, as we have seen, the defendant lost the benefit of the plaintiffs' responsibility by the transfer of the title without any consideration whatever to a person of at least doubtful responsibility, and thus was not sufficiently protected in making the large expenditure required for the building of the houses.) The defendant had a right to rely upon the responsibility of the plaintiffs under the contract, and the want of it may well have prevented the defendant from taking possession and from erecting the buildings as was intended. The subsequent reconveyance by Findull to Sarah James could have no effect in restoring the defendant's rights which were affected by the conveyance to Findull. The conveyance from Findull to the plaintiffs was not made until some months after the conveyance by the plaintiffs to him, and was recorded even long after

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that, and it is not proved to have been brought to the knowledge of the defendant. The defendant, with knowledge of the want of title in the plaintiffs, was not, under the covenants in the contract, bound to take possession and proceed with the erection of the buildings.

The question whether the deed to Findull was made and delivered before or after the making and delivery of the contract is not vital, as in either contingency the plaintiffs had broken the covenant of seizin, and as the covenants were dependent and mutual, the defendant was under no obligation to proceed and erect the buildings and fulfil the terms of the contract. In view of the covenants which have been considered, the contract was at an end when the conveyance was made to Findull. The finding of the judge, that the contract was executed and delivered upon the 11th day of January, 1871, being the time of its acknowledgment, instead of the day of its date, is therefore not material, and even if erroneous, cannot affect the result. For the same reason the refusal to find that the deed was delivered after the date of the contract was not erroneous. There was no error in refusing to send the case back for further findings, or in any of the refusals to find, or in any other respect.

The judgment should be affirmed.

All concur except FOLGER, C. J., and RAPALLO, J., not voting, and FINCH, J., absent at argument.

*Judgment affirmed.*¹

WILLIAM ZIEHEN, RESPONDENT, v. DAVID J. SMITH,
APPELLANT.

NEW YORK COURT OF APPEALS, JANUARY 30-FEBRUARY 25, 1896.

[Reported in 148 *New York*, 558.]

O'BRIEN, J. The plaintiff, as vendee, under an executory contract for the sale of real estate, has recovered of the defendant, the vendor, damages for a breach of the contract to convey, to the extent of that part of the purchase money paid at the execution of the contract, and for certain expenses in the examination of the title. The question presented by the record is whether the plaintiff established at the trial such a breach of the contract as entitled him to recover.

By the contract, which bears date August 10, 1892, the defendant agreed to convey to the plaintiff by good and sufficient deed the lands described therein, being a country hotel with some adjacent land. The plaintiff was to pay for the same the sum of \$3,500, as follows: \$500 down, which was paid at the time of the execution of the contract, \$300 more on the 15th day of September, 1892. He was to assume an existing mortgage on the property of \$1,000, and the balance of \$1,700

¹ *Fort Payne Co. v. Webster*, 163 Mass. 134, acc. See also *Leonard v. Bates*, 1 Blackf. 172; *Russ Lumber Co. v. Muscupiabe Co.*, 120 Cal. 521.

Garberino v. Roberts, 109 Cal. 125; *Webb v. Stephenson*, 11 Wash. 342, contra. See also *Joyce v. Shafer*, 97 Cal. 335; *Shively v. Semi-Tropic, etc. Co.*, 99 Cal. 259.

he was to secure by his bond and mortgage on the property, payable, with interest, one year after date. (The courts below have assumed that the payment of the \$300 by the plaintiff, the execution of the bond and mortgage, and the delivery of the conveyance by the defendant, were intended to be concurrent acts, and, therefore, the day designated by the contract for mutual performance was the 15th of September, 1892. Since no other day is mentioned in the contract for the payment of the money, or the exchange of the papers, we think that this construction was just and reasonable, and, in fact, the only legal inference of which the language of the instrument was capable. It is not alleged or claimed that the plaintiff on that day, or at any other time, offered to perform on his part or demanded performance on the part of the defendant, and this presents the serious question in the case and the only obstacle to the plaintiff's recovery. (It is, no doubt, the general rule that in order to entitle a party to recover damages for the breach of an executory contract of this character he must show performance or tender of performance on his part.) He must show in some way that the other party is in default in order to maintain the action, or that performance or tender has been waived.) But a tender of performance on the part of the vendee is dispensed with in a case where it appears that the vendor has disabled himself from performance, or that he is on the day fixed by the contract for that purpose, for any reason, unable to perform. The judgment in this case must stand, if at all, upon the ground that on the 15th day of September, 1892, the defendant was unable to give to the plaintiff any title to the property embraced in the contract, and hence any tender of performance on the part of the plaintiff, or demand of performance on his part, was unnecessary, because upon the facts appearing it would be an idle or useless ceremony.

It appeared upon the trial that at the time of the execution of the contract there was another mortgage upon the premises of \$1,500, which fact was not disclosed to the plaintiff, and of the existence of which he was then ignorant. That on or prior to the 21st of July, 1892, some twenty days before the contract was entered into, an action was commenced to foreclose this mortgage, and notice of the pendency of the action filed in the county clerk's office. That on the 30th of September following judgment of foreclosure was granted and entered on the 31st of October thereafter, and on the 28th of December the property was sold to a third party by virtue of the judgment, and duly conveyed by deed from the referee. It appears that the defendant was not the maker of this mortgage and was not aware of its existence, but it was made by a former owner, and the defendant's title was subject to it when he contracted to sell the property to the plaintiff.

The decisions on the point involved do not seem to be entirely harmonious. In some of them it is said that the existence, at the date fixed for performance, of liens or incumbrances upon the property is sufficient to sustain an action by the vendee to recover the part of the purchase money paid upon the contract. (*Morange v. Morris*, 3 Keyes,

48; *Ingalls v. Hahn*, 47 Hun, 104.) (The general rule, however, to be deduced from an examination of the leading authorities seems to be that in cases where by the terms of the contract the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the non-performance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party.) The qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. If the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract, or for damages. (*Hudson v. Swift*, 20 Johns. 24; *Fuller v. Hubbard*, 6 Cow. 13; *Green v. Green*, 9 Cow. 47; *Hartley v. James*, 50 N. Y. 38; *Bigler v. Morgan*, 77 N. Y. 312; *Burwell v. Jackson*, 9 N. Y. 547; *Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328; *Tamsen v. Schaefer*, 108 N. Y. 604.)

(In this case there was no proof that the defendant waived tender or demand either by words or conduct. The only difficulty in the way of the performance on his part was the existence of the mortgage which the proof tends to show was given by a former owner and its existence on the day of performance was not known to either party.) In order to sustain the judgment we must hold that the defendant on the day of performance was unable to convey to the plaintiff the title which the contract required, simply because of the existence of the incumbrance. We do not think that it can be said upon the facts of this case that the defendant had placed himself in such a position that he was unable to perform the contract on his part and that his title was destroyed or that it was impossible for him to convey within the meaning of the rule which dispenses with the necessity of tender and demand in order to work a breach of an executory contract for the sale of land. It cannot be affirmed under the circumstances that if the plaintiff had made the tender and demand on the day provided in the contract that he would not have received the title which the defendant had contracted to convey. (The contract is not broken by the mere fact of the existence on the day of performance of some lien or incumbrance which it is in the power of the vendor to remove.) That is all that was shown in this case, and hence the judgment was recovered in violation of an important principle of the law governing contracts.

For this reason the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ *Higgins v. Eagleton*, 155 N. Y. 466, acc.

EX PARTE CHALMERS. IN RE EDWARDS. *! not met*

IN CHANCERY, JANUARY 24-31, 1873.

[Reported in *Law Reports*, 8 *Chancery Appeals*, 289.]

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 19th of October, 1870, Messrs. Hall Brothers & Shaw, of Widnes, contracted to sell to the bankrupt Edwards 330 tons of bleaching-powder, upon terms which were stated in the following letter written by their agent:—

“DEAR SIR,—I have this day sold to you, on account of Messrs. Hall Brothers & Shaw, Widnes, 330 tons of bleaching-powder, 85 per cent, at 8s. 6d. per cwt., free on board here, to be delivered thirty tons per month from February to December, 1871, both inclusive. To be packed in oak casks, and to be unbranded. Payment by cash in fourteen days from date of each delivery, deducting 2½ discount.”

(Under the terms of this contract the monthly instalments up to and including the October instalment were delivered and paid for.) The November instalment was delivered, but was not paid for.

On the 20th of December, 1871, Edwards called a meeting of his creditors, at which he declared himself insolvent. Messrs. Hall & Co. attended this meeting, and on the 23d of December they wrote a letter to Edwards in the following terms:—

“We give you notice that we refuse to deliver any more bleaching-powder upon contract.”

Accordingly, the December instalment of bleaching-powder was never delivered.

On the 1st of January, 1872, Edwards filed a petition for liquidation by arrangement; but on the 19th of January it was resolved to proceed in bankruptcy, and he was adjudicated a bankrupt on the 8th of February following. Mr. Chalmers was subsequently appointed trustee.

Under these circumstances the trustee claimed the delivery of the thirty tons of bleaching-powder, and on Hall & Co. refusing to deliver them, he claimed, in the County Court at Liverpool, damages amounting to £150 against Hall & Co., for their breach of the contract. The County Court Judge having refused his application, the trustee applied to the Chief Judge in Bankruptcy, who affirmed the decision of the County Court Judge. The trustee now renewed the application before the Court of Appeal.

SIR G. MELLISH, L.J., after stating the facts of the case, continued as follows:—

The first question that arises is, what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result

of the authorities is this — (that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him) and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered.) In *Bloxam v. Sanders*,¹ BAYLEY, J., says: “If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in a case of insolvency the point seems to be perfectly clear: *Hanson v. Meyer*.² (If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*.) Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu*, *à fortiori* is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right.”

In *Wentworth v. Outhwaite*,³ PARKE, B., says: “What the effect of stoppage *in transitu* is, whether entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. (If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey’s end. His right of lien on the part stopped is revested, but no more.)

And in *Griffiths v. Perry*,⁴ CROMPTON, J., says: “A vendor’s lien on specific goods sold is gone when a bill is given for the price, but revives if that bill is dishonored before he has parted with possession of the goods; or rather, he then acquires, not a lien, strictly speaking, but a right of withholding delivery, analogous to the right of an unpaid vendor to stop *in transitu*. *Miles v. Gorton*,⁵ and many other cases,

¹ 4 B. & C. 941, 948.⁴ 1 E. & E. 680, 686.² 6 East, 614.⁵ 2 Cr. & M. 504.³ 10 M. & W. 436, 452.

show that a part delivery of the goods does not do away with the right to withhold delivery of the rest, unless such part delivery is intended as a delivery of the whole. Then does it make any difference here that the goods were not specific goods? I think that *Valpy v. Oakeley*¹ is conclusive to show that it does not; and I consider that case to have been rightly decided. . . . What, then, is the position of the parties upon the bill becoming dishonored and the vendee insolvent? According to Lord ABINGER's view of the law in *Miles v. Gorton*, the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it."

In both *Bloxam v. Sanders* and *Wentworth v. Outhwaite* there had been a sale of specific goods, not merely an agreement to sell goods to be delivered by instalments; but it would be strange if the right of a vendor, who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods; and the judgment of CROMPTON, J., in *Griffiths v. Perry*, to which I have referred, shows clearly that there is no difference between the two cases.

I am, therefore, of opinion that, in the present case, when the insolvency of the purchaser had been declared the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23d of December? Mr. Russell argued that the refusal to perform a contract before the time arrives for its performance is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not. I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by CROMPTON, J., in *Griffiths v. Perry*, that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this

¹ 16 Q. B. 941.

would, without doubt, be allowed by his creditors or by the Court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts. (In the present case, Edwards, by calling his creditors together and informing them of his insolvency, practically gave notice to Hall & Co. that he did not mean to pay them either for the November or the December instalment. Indeed he could not pay for the November instalment without the consent of the other creditors; it would have been a fraudulent preference. Both parties knew that he had no intention of paying any further sum; and Hall & Co.'s letter of the 23d of December only means that on the assumption, which assumption they were, under the circumstances, justified in making, that the November and December instalments would not be paid, they refused to deliver any more bleaching-powder. In my opinion they had a right to say that, and they committed no breach of the contract by writing the letter. The appeal must therefore be dismissed with costs.

LORD SELBORNE, L. C. I entirely agree in the judgment of the Lord Justice, and in the reasons he has given for it.

SIR WM. JAMES, L. J. I am of the same opinion.¹

ROBERTSON v. DAVENPORT & PATTERSON.

ALABAMA SUPREME COURT, JUNE TERM, 1855.

[Reported in 27 Alabama, 574.]

ACTION under code on open account for goods sold and delivered.

This action was brought by Davenport & Patterson, as partners, against Thomas H. Robertson, on an open account for \$159.33. The defendant pleaded only a special plea, alleging, in substance, that in 1853 he entered into a contract with plaintiffs, by which they promised

¹ Bloomer v. Bernstein, L. R. 9 C. P. 588; Morgan v. Bain, L. R. 10 C. P. 15; Mess v. Duffus, 6 Comm. Cas. 165; Re Phenix Bessemer Steel Co., 4 Ch. D. 108; Brassel v. Troxel, 68 Ill. App. 131; Rappleye v. Racine Seeder Co., 79 Iowa, 220; Hobbs v. Columbia Falls Co., 159 Mass. 109; Lennox v. Murphy, 171 Mass. 370, 373; Pardee v. Kanady, 100 N. Y. 121; Vandergrift v. Cowles Engineering Co., 161 N. Y. 435; Diem v. Koblitz, 49 Ohio St. 41; Dougherty Bros. v. Central Bank, 93 Pa. 227; Lancaster Bank v. Huver, 114 Pa. 216, acc. See also Sale of Goods Act, §§ 18, 41.

Compare *Ex parte* Pollard, 2 Low. 411; Stokes v. Baar, 18 Fla. 656; Chemical Nat. Bank v. World's Fair Exposition, 170 Ill. 82; C. F. Jewett Pub. Co., 159 Mass. 517; Bank Commissioners v. New Hampshire Trust Co., 69 N. H. 621.

and agreed to sell and deliver to him fifty casks of Stagg & Shay's hams, at the price of 10½ cents per pound, and to furnish them to him as he might require during the then ensuing season; that, under and pursuant to said agreement, plaintiffs did furnish him with twenty casks of said hams, which he received and paid for at the stipulated price, excepting a small balance, which is the sum sued for in this action: that they wholly failed and refused to furnish the remainder of the casks contracted for, although he was ready and willing (and so informed them) to receive and pay for the same according to the stipulations of said contract; that by reason of this failure on their part, the price of said hams having risen in Mobile to 16 cents per pound, defendant (who was a grocer in Mobile) sustained damage to the amount of about \$500, which he insists he has a right to recoup in this action, and therefore claims judgment for the balance in his favor.

A demurrer was interposed to this plea, but the Court overruled it; and a trial was then had on issue joined.

On the trial, as appears from the bill of exceptions, "it was shown that the hams sold, the price of which was sued for, were part and parcel of fifty tierces of hams which the plaintiffs had agreed, in December, 1852, or January, 1853, to furnish to the defendant during the coming year (until new hams came into market), as he should want them, and as they could be obtained from Cincinnati within a reasonable time after notice; the defendant being a grocery merchant in the city of Mobile. They were to be Stagg & Shay's hams, and were to be furnished at the rate of 10 cents per pound, adding thereto the expenses from Cincinnati to Mobile, which would be about 1½ cents per pound. About eighteen tierces had been delivered from time to time, part of the money for which had been paid; and a part of the hams which were delivered on the 15th, 20th, and 24th of August, 1853, constituted those sued for in this action. The defendant refused *(to pay for them?)*, because he believed, from information derived from other sources than the plaintiffs, that he could not get the balance of hams contracted for, and that the injury he would sustain by reason of plaintiffs' non-compliance with their contract would be much more than the price of the hams now sued for. By the terms of the contract, the hams were to be paid for, from time to time, as delivered: and after the hams now sued for were delivered, the money was demanded, and payment refused by the defendant; and no more hams were delivered to him after such refusal. The defendant introduced several witnesses, grocery merchants in Mobile, who testified, that they had severally made similar agreements with plaintiffs that season, to be supplied with Stagg & Shay's hams, from time to time, in large quantities, at the same price; that a portion of the hams had been delivered by plaintiffs to each of them, but after the delivery of less than half of what they were to have received, neither of them could get any more; that they could obtain none from plaintiffs after the 15th or 20th August, 1853, and that plaintiffs, after that time, had no more

hams to supply to those with whom they had contracted, and did wholly fail to supply them (said witnesses), with many other grocery merchants, with hams in pursuance of their contracts after that date. Defendant proved, also, that along in the summer of 1853 hams rose in price from 12½ to 16 cents per pound, and that the price kept up in Mobile until new hams came in the following season; and that he had sustained damage, by reason of his not getting the hams as contracted for, to a greater amount than the sum claimed by plaintiffs.

"After the Court had charged the jury generally, the defendant requested the Court to instruct them, that if they believed that plaintiffs, at the time when the money for the bill sued upon was demanded, had ceased to have ability to comply with their contract, and the defendant knew that fact, he might refuse to pay for the hams sued for, and might recoup his damages. This charge the Court refused to give, and the defendant excepted."

The refusal to give this charge is now assigned for error.

Charles P. Robinson, for the appellant, contended, that an express refusal, on the part of the plaintiffs, to continue to furnish hams during the season, would certainly justify a refusal by the defendant to pay for those already furnished, and the recoupment of his damages; and that an inability to perform, as shown by the evidence, was tantamount to a refusal.

K. B. Sewall, *contra*, made the following points:

1. The defendant's refusal to pay for the hams delivered to him on the 15th, 20th, and 24th August, was a breach of the contract on his part, and gave to the plaintiffs, who were then in no default, a right to abandon the contract, and to recover the price of the hams delivered. *Fletcher v. Cole*, 23 Vermont R. 114; *Pounds v. Baxter*, 4 Greenl. 454; *Dwinel v. Howard*, 30 Maine R. 258; *Allen v. Robinson*, 2 Barb. (S. C.) 341; *Martin v. Chapman*, 6 Port. 344; *Pharr v. Bachelor*, 3 Ala. 240; *Davis v. Wade*, 4 id. 208; *Lord v. Belnap*, 1 Cushing's R. 283; 6 English Law & Equity R. 230.

2. Rumor and information, as to plaintiffs' inability to perform their contract, whether believed or not, formed no excuse for the defendant's breach of contract.

RICE, J. "However technical rules are to be attended to, and in some cases cannot be dispensed with, yet, in administering justice, we must not lose sight of common sense; and the common sense of this case will not be found to militate against any rule of law." *Rawson v. Johnson*, 1 East's Rep. 204.

No doubt can be entertained, that under the evidence disclosed in the record, the charge as asked by the appellant should have been given. *Tucker v. Woods*, 12 Johns. R. 190; *Judson v. Wass*, 11 id. 525; *Wadlington v. Hill*, 10 Smedes & Marsh. R. 560; *Bank of Columbia v. Hagner*, 1 Peters' R. 465; *Gardner v. King*, 2 Iredell's R. 297; *Jones v. Barkley*, Doug. R. 659; *Waterhouse v. Skinner*, 2 Bos. & Pul. 447; 1 Saund. Pl. & Ev. 116; *Thorpe v. Thorpe*, 1 Salk. R. 171; Cal-

onel v. Briggs, id. 112; Langfort v. Adm'r of Tiler, id. 113; Lancashire v. Killingworth, 2 id. 623; Goodisson v. Nunn, 4 Term R. 761; Morton v. Lamb, 7 id. 125; Rawson v. Johnson, *supra*; Powell on Contracts, 417, 418, 419; Marshal v. Craig, 1 Bibb's R. 379, 390; Carrell v. Collins, 2 id. 429.

For the error of the Court below in refusing the charge as asked, the judgment is reversed, and the cause remanded.

MARTINDALE v. FISHER.

IN THE KING'S BENCH, EASTER TERM, 1745.

[Reported in 1 Wilson, 88.]

THIS is a special action upon the case, wherein the plaintiff sets forth in his declaration that a horse-race was agreed to be run between a horse of the plaintiff and one of Sir Marmaduke Wyvill's; and that in consideration that the plaintiff had agreed to deliver to the defendant three yards and one-eighth of cloth, the defendant agreed to pay to the plaintiff 5*l.* 12*s.* 6*d.* in case Sir Marmaduke Wyvill's horse should beat the plaintiff's horse, but if the plaintiff's horse beat Sir M. W.'s then defendant to pay nothing for the cloth; and avers that Sir M. W.'s horse won the race: upon the general issue there was a verdict for the plaintiff. It was now moved in arrest of judgment; and the exception taken to the declaration by Serjeant *Boote* was, that it is not averred in the declaration that the cloth was delivered to the defendant; but to this it was answered by Mr. *Ford*, and resolved by the Court, that this was an action founded on mutual promises, and that here was only promise for promise, and therefore it was not necessary for the plaintiff to make an averment in his declaration of the delivery of the cloth; and the Court said the case of *Nichols and Raynbred*, Hob. 88, is in point. *DENNISON, J.*, said, that where a plaintiff declares that in consideration he the said plaintiff would deliver to the defendant a piece of cloth, that the defendant should pay such a sum of money for it, in that case an averment of the delivery of the cloth is necessary; but if plaintiff states an agreement, and then lays it that in consideration of such a promise or agreement, &c., there is no need of an averment. So *N. B. the difference*. And the *postea* was ordered to be delivered to the plaintiff. *Vide* Hob. 106; Yelv. 136; 1 Lev. 298; Hard. 103.

CHRISTIE v. BORELLY.

IN THE COMMON PLEAS, JANUARY 17, 1860.

[Reported in 29 Law Journal Reports, Common Pleas, 153.]

THE first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange of 100*l.* and 62*l.*, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on the 28d of January, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant in return engaged and guaranteed to the plaintiff the repayment of the sum of 300*l.* towards the payment of Scotch whiskeys, as follows: 6 puncheons, 5 hhds., 4 qr. casks, Auchtertool, 2 puncheons, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his the defendant's part of the said agreement; and that the said two bills of exchange of 100*l.* and 62*l.* were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; and that he the plaintiff delivered to the said Mr. B. Fisse the said Scotch whiskeys in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse, although requested to pay the said amount of 300*l.* towards the payment of the said Scotch whiskeys, had not paid for the said Scotch whiskeys, nor the said sum of 300*l.* or any part thereof, and the same still remained wholly due and unpaid; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of 300*l.* or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (*inter alia*) secondly, to the said first count, that, although the said debt and sum of 300*l.* in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew; yet the said two bills of exchange of 100*l.* and 62*l.*, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on

the issue taken on the second plea, the Court, in Michaelmas Term last, on the application of *Edward James*, granted a rule *nisi* to enter judgment for the plaintiff on such issue *non obstante veredicto*, on the ground that the said second plea was no answer to the action. Against this rule,

Petersdorff, Serjt., and *Garth* now showed cause.

The performance of the defendant's engagement was to be after that which was the consideration for it, that is to say, after the bills which the plaintiff guaranteed became due, and, therefore, it is submitted that the performance by the plaintiff of his part of the contract was a condition precedent to his right to sue the defendant. The Court, in all such cases as these, will always endeavor to ascertain from the terms of the contract the intention of the parties. *Tindal*, C. J., in *Stavers v. Curling*, says, "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case." In *Johnstone v. Nichols*¹ the question was as to the sufficiency of the consideration to support the promise laid in the declaration. The promise was stated thus, namely: that in consideration the plaintiffs would continue certain dealings which they had had with Messrs. Claridge & Co., the defendant promised the plaintiffs to be responsible and guarantee them the payment of any sums of money in which Messrs. Claridge & Co. then were, or at any time thereafter might be, indebted to the plaintiffs in the course of such dealings; and Maule, J., (page 156) said, "These words, in fact, amount to this, that in consideration the plaintiffs would do something *in futuro*, the defendant promised to do something *in futuro* likewise." So here, looking at this agreement as it appears on the record, it means, if the plaintiff will pay the two bills drawn on Owen & Co., in case they are not duly honored, the defendant will pay the 300*l.* in case the whiskeys are not paid for by Fisse. The averment in the declaration of performance by the plaintiff of all things on his part to be performed, in pursuance of the agreement, to entitle him to be paid the 300*l.*, shows that the plaintiff considered it to be a condition precedent to the defendant's liability. Inasmuch as the 300*l.* could not be payable until after the bills on Owen & Co. were due, the case falls within the second rule laid down in the notes to *Pordage v. Cole*² for ascertaining what amounts to a condition precedent, where it is stated that "(when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." To the same effect is the second resolution in *Thorpe v. Thorpe*. [WILLES, J. In *Thomas v. Cadwalader*, where there was a covenant by a lessee to repair, the lessor allow-

¹ 14 Law J. Rep. (N. S.) C. P. 151; s. c. 1 Com. B. Rep. 251.

² 1 Wms. Saund. 390*k*.

ing and assigning timber for the repairs, it was held to be a condition precedent that the lessor should find and assign timber, but that was explained by Willes, C. J., to be because the one covenant related to the other, and the lessee could not repair until the timber was assigned him for such repairs; but, "when two covenants in a deed have no relation to each other, I was clearly of opinion," said Willes, C. J., "that the non-performance of the one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other." Here the plaintiff's engagement is the sole consideration for the defendant's promise, and there is an entire failure of performance by the plaintiff. *Franklin v. Miller* shows the distinction between a partial and total failure of performance.

Grant, in support of the rule. The law is not disputed. The courts have ever since the case of *Thomas v. Cadwallader* endeavored to ascertain the object of the parties by looking at the contract itself. The apparent intention of the parties is the governing rule for the construction of the covenants. *Glazebrook v. Woodrow*. (He was then stopped by the Court.)

ERLE, C. J. I am of opinion that this rule should be made absolute: and that the plaintiff is entitled to have judgment entered for him *non obstante veredicto*. The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of 300*l.* towards the payment of certain whiskey being paid for when due; and the plaintiff guarantees that two bills of exchange of 100*l.* and 62*l.* shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side: on the one side they would be 300*l.*, and on the other only 162*l.*; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condition precedent to performance of the other.) The question is, to my mind, one entirely of fact, namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise was not a condition precedent; and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

WILLIAMS, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what

it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterwards ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

WILLES, J. I am of the same opinion. It appears to me that the promise only on the one side is the consideration for the promise on the other side; and that the plea is, therefore, a bad plea.

*Rule absolute.*¹

DANIEL G. LEAVITT v. CHARLES G. FLETCHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1865.

[Reported in 10 Allen, 119.]

CONTRACT brought by a lessee against a lessor to recover damages for a breach of the covenant to repair. The material portions of the lease and the agreed facts upon which the case was submitted to the determination of the whole court are stated in the opinion.

D. S. Richardson & B. J. Williams, for the plaintiff.

T. H. Sweetser & W. S. Gardner, for the defendant.

GRAY, J. By the indenture upon which this action is brought the defendant "does lease, demise, and let" to the plaintiff a brick stable standing on the lessor's own land, and a wooden carriage-house standing on land held by him under a lease from others, with a provision that if they shall require the termination of that lease and the removal of the carriage-house, the plaintiff may terminate this lease. The lessor "agrees to make all necessary repairs on the outside of said building." The lessee agrees to pay a certain rent monthly, and to quit and deliver up the premises to the lessor at the end of the term "in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessor;" not to make or suffer any waste thereof; and "that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And said lessee is to make all necessary repairs on the inside of the building at his own expense."

The brick stable is the building mentioned in the lease next before the lessor's covenant to make outside repairs; but we have no doubt

¹ *Gibson v. Goldsmith*, 5 D. M. & G. 757; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, acc. Compare *Griggs v. Moors*, 168 Mass. 354; *Martin v. Schoenberger*, 8 W. & G. 367.

that this covenant includes all the premises leased by the defendant to the plaintiff, the carriage-house as well as the stable. Indeed in the duplicate indenture in the hands of the defendant the plural word "buildings" is substituted for "building" in this covenant.

The facts agreed by the parties are as follows: The carriage-house was a frame covered with matched boards, had a shingled roof and a plank floor, and on the inside was left uncovered by lath or plaster. While the plaintiff was occupying the premises under the lease, a quantity of snow accumulated upon the roof of the carriage-house, until, at the close of a heavy snow storm, the carriage-house fell from the weight of snow, crushing and injuring the plaintiff's carriages kept therein. The plaintiff afterwards demanded of the defendant that he should restore and rebuild the carriage-house, but the defendant refused to do so. There is nothing in the case to show that any negligence of either party contributed to the accident.

For five months succeeding the fall of the carriage-house, the plaintiff paid to the defendant, under protest, the rent reserved in the lease; and then, ceasing to pay rent, was ejected by the defendant. The lessee's covenant to pay rent was not affected by the injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant, and is independent of the lessor's covenant to make outside repairs. *Belfour v. Weston*, 1 T. R. 310; *Hare v. Groves*, 8 Anstr. 687; *Kramer v. Cook*, 7 Gray, 550, and cases cited. And it is not now denied that the lessee was rightly required to pay rent, and lawfully ejected for failing to pay.¹

The lessee in this action claims damages, 1st, for the injury occasioned by the fall of the carriage-house; 2dly, for the failure of the lessor to rebuild it, after being expressly requested so to do.

It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, id. 242, and cases cited; *Welles v. Castles*, 3 Gray, 826. The express covenant of the defendant in this case is only "to make all necessary repairs on the outside of the building." He does not covenant that the outside shall not give way, but that, if it does, he will repair it. He cannot therefore be held liable for the damages occasioned by the fall of the building.

¹ *Dawson v. Dyer*, 5 B. & Ad. 584; *Suplice v. Farnsworth*, 7 M. & G. 576; *Edge v. Boileau*, 16 Q. B. D. 120; *Lewis v. Chisholm*, 68 Ga. 40; *Palmer v. Meridian Britannia Co.*, 188 Ill. 508; *Thomson-Houston Co. v. Durant Land Co.*, 144 N. Y. 34; *Prescott v. Ottenstatter*, 85 Pa. 434, acc. But if a landlord covenants to keep premises in repair, and nevertheless allows the premises to become untenable, the tenant may abandon them, and thereby terminate his liability for rent. *Lewis v. Chisholm*, 68 Ga. 40; *Bizzell v. Lloyd*, 100 Ill. 214; *Sheary v. Adams*, 18 Hun, 181 (statutory); *McCardell v. Williams*, 19 R. I. 701.

A promise to put in repair was held a condition precedent to the obligation of the lessee to take the premises in *Hickman v. Rayl*, 55 Ind. 212. Similarly the obligation of one who had agreed to purchase. *Tripp v. Smith*, 180 Mass. 122. Compare *Shenners v. Pritchard*, 104 Wis. 257.

But it has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger. Yearbook 40 Ed. III. 6; Dyer, 33 a; Paradine v. Jane, Aleyn, 27; s. c. Style, 47; Compton v. Allen, Style, 162; Bullock v. Dommitt, 6 T. R. 650; Green v. Eales, 2 Q. B. 225; s. c. 1 Gale & Dav. 468; Phillips v. Stevens, 16 Mass. 238; Bigelow v. Collamore, 5 Cush. 231; Allen v. Culver, 3 Denio, 294; Dermott v. Jones, 2 Wallace, 7, 8. The defendant's covenant contains no exception of natural causes or inevitable accident. "The outside of the building" includes the whole outer shell of the building, or external inclosure of roof and sides. Green v. Eales, above cited. "The necessary repairs on the outside" are those which will make the building outwardly complete. When those are made, then, and not before, the lessee will be bound by his covenant "to make all necessary repairs on the inside." The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside, and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant. The defendant is therefore responsible for the damages suffered by the plaintiff by reason of the defendant's refusal to rebuild, from the time of that refusal until the ejectment of the plaintiff for not paying his rent; and according to the agreement of the parties the case must stand for the assessment of those damages.

*Judgment for the plaintiff accordingly.*¹

BLANDFORD v. ANDREWS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1599.

[Reported in *Crooke Elizabeth*, 694.]

DEBT on an obligation of 80*l.* conditioned that if the defendant procured a marriage to be had between the plaintiff and one Bridget Palmer, at or before the feast of St. Bartholomew then next following, that then, &c. The defendant pleaded that the plaintiff, before that feast, came to the said Bridget Palmer and called her whore; and told her that, if he married her, he would tie her to a post; and used other opprobrious words unto her; by reason whereof the defendant could not procure the said marriage before the said feast. Whereupon the plaintiff demurred. *Williams*, Serjt., moved that this was not any plea; for he hath not shown that he used his endeavor to procure the

¹ As to the liability of a covenantor to repair the consequences of extraordinary casualties, see 36 Am. L. Reg. (N. S.) 212.

marriage; for it may be that, notwithstanding these words, they would have intermarried. And of that opinion was all the Court; for the defendant ought to show that there was not any default in him, and that he did as much as in him lay to procure it; otherwise he doth not save his obligation; and these words spoken before the day, at one time only, are not such an impediment but that the marriage might have taken effect. Wherefore it was adjudged for the plaintiff.

UNITED STATES v. PECK.

PECK v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1880.

[Reported in 102 United States, 64.]

APPEALS from the Court of Claims.

Peck, the claimant, entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the military station at Tongue River, in the Yellowstone region, on or before a specified day. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officers of the government claimed the right to deduct from the claimant's wood account the increased cost of the hay. Whether this could lawfully be done was the principal question in the cause.

The Court, upon an examination of the contract and of the surrounding circumstances of the case, were of opinion that the contracting parties, in stipulating relating to hay, contemplated hay to be cut in the Yellowstone valley, and specially at the Big Meadows near the mouth of Tongue River, — which was, indeed, the only hay which the claimant could have procured within hundreds of miles, and which it was known he relied on. The government officers, fearing that the claimant would not be able to carry out his contract, and it being absolutely necessary that the hay should be had, allowed other parties to cut the hay at Big Meadows, and therewith to supply the Tongue River station. The claimant complained of the double injury (first, of giving him the hay which he relied on to other parties; and, secondly, of charging him for the increased expense of getting it.) The question was whether the surrounding circumstances could be taken into consideration in the claimant's excuse, although the contract made no mention of the source from which he was to procure the hay to be supplied by him to the government.

Mr. Assistant Attorney-General Smith, for the United States.

Mr. John B. Sanborn, contra.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the Court.

Remitted to the Court of Claims

Read

We think that the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: first, for the purpose of showing, by the surrounding circumstances, the subject-matter of the contract, namely, hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendants by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract.

That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances, see *Bradley v. Washington, Alexandria, & Georgetown Steam Packet Co.*, 13 Pet. 89; *Thorington v. Smith*, 8 Wall. 1; *Maryland v. Railroad Company*, 22 id. 105; *Reed v. Insurance Company*, 95 U. S. 23; 1 Greenl. Evid. sect. 277; *Taylor*, Evid. sect. 1082. And that the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see *Addison, Contracts*, sect. 326; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. Judge Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A. gave to B. a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A. thereupon sold the premises to a third person, it was held that though the bond was not cancelled or given up, nor any of the papers changed, yet by the parol agreement and the acts of the parties under it the bond was discharged. *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; and see 2 Cowen & Hill's Notes to Phillips on Evid. 605. The principle involved in these cases is applicable to the present.

*Judgment affirmed.*¹

¹ *Lancashire v. Killingworth*, 1 Lord Ray. 686; *Mackay v. Dick*, 6 App. Cas. 251; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 552; *Kingman v. Western Mfg. Co.*, 92 Fed. Rep. 486; *Tennessee, &c. R. R. Co. v. Danforth*, 112 Ala. 80; *Wolf v. Marsh*, 54 Cal. 228; *Love v. Mabury*, 59 Cal. 484; *Griffith v. Happersberger*, 86 Cal. 605; *Durland v. Pitenirn*, 51 Ind. 426; *King v. King*, 69 Ind. 467; *Dill v. Pope*, 29 Kan. 289;

SIR ANTHONY MAYNE'S CASE.

IN THE QUEEN'S BENCH, EASTER TERM, 1596.

[Reported in 5 Reports, 20 b.]

THE case in effect was, that Sir Anthony Mayne did lease certain land to Scott for twenty-one years by indenture, and covenanted that at any time during the life of Scott, upon surrender of his lease, Sir Anthony, &c., would make a new lease during the residue of the years, and bound himself to perform the covenants, &c. And now in debt on the said obligation by Scott against Sir Anthony, he pleaded that Scott did not surrender, &c. To which Scott replied, and said, that after the said lease Sir Anthony had accepted a fine *sur conusans de droit come ceo*, &c., and by the same fine granted and rendered the land to the conusee for eighty years: upon which the defendant did demur in law. And it was adjudged for the plaintiff. And in this case three points were resolved:—

1. That Sir Anthony Mayne had broken his covenant without any surrender made: for, by the said fine levied by him for eighty years, he had disabled himself either to take a surrender or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless;) *lex neminem cogit ad vana seu inutilia peragenda*: but it would be vain to compel him to make a surrender to him who cannot take it; and although the lessee in this case by the words of the indenture ought to do the first act, *scil.* to make the surrender, yet when the lessor hath disabled himself, not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. *Vide* 32 E. III., Barre 264, and 21 E. IV., 55 a. If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before the said feast, you have forfeited your obligation, although you repurchase the land again before the feast, because you were once disabled to make the feoffment. And therewith agreeth Temp. E. I., Covenant 29. A man leased a manor for years, and the lessee covenanted to keep the houses of the manor and as much as was in the manor in as good plight as he found them; during the term the lessee committed waste in the houses, and in cutting of oaks; the lessor brought an action of covenant before the end of the term for the oaks, because for them it was impossible that the covenant should be performed; otherwise it is of

Jones v. Walker, 13 B. Mon. 163; De La Vergne Co. v. New Orleans Co., 51 La Ann. 1733; North v. Mallory, 94 Md. 305; Grice v. Noble, 59 Mich. 515; Lee v. Briggs, 99 Mich. 487; Gallagher v. Nichols, 60 N. Y. 438; Nichols v. Scranton Steel Co., 137 N. Y. 471; Baker v. Woman's Union, 57 N. Y. App. Div. 290; Guilford v. Mason (R. I.), 53 Atl. Rep. 284; Olson v. Snake River Co., 22 Wash. 139; Jones v. Singer Mfg. Co., 38 W. Va. 147, *acc.*

See also District of Columbia v. Camden Iron Works, 181 U.S. 453; Holt v. Silver, 169 Mass. 435; 59 Am. St. Rep. 283, n.

the houses; and therewith agree F. N. B. 145 K, and 13 E. III., Tit. Covenant 2.

2. It was resolved, if a man seised of lands in fee covenants to enfeoff J. S. of them upon request, and afterwards he makes a feoffment in fee of the said lands; now in this case J. S. shall have an action of covenant without request. And that in effect is all one with the principal case.

3. It was resolved that, in the case at bar, if the said term of eighty years were but an interest of a future term, so that Scott notwithstanding that might make the surrender, yet in such case Scott should have an action of covenant without making any surrender; for true it is that he may surrender; but also true it is that Sir Anthony after such surrender cannot make the new lease, which was the effect that the surrender should produce; and therefore inasmuch as the lessor hath disabled himself to make a new lease, which is the effect and end of the surrender, and that which he ought to do on his part, the lessee shall not be enforced to make the surrender, which is the first thing to be done on his part, for by the surrender he would lose his old term without a possibility of having the new according to the lessor's covenant. And therewith agreeth 14 H. IV., 19 a. J., parson of the church of G., was bound in an obligation of 100*l.* to the prior of E.; the condition was that if the parson resign his church within certain time to the prior for a certain pension as they could agree, that then the obligation should be void; and afterwards and within the time the prior and parson agreed of a pension of 5*l.*, yet the parson did refuse to resign. And the opinion of the whole Court was that, although they had agreed of the pension, yet the parson is not bound to resign until he be sure of the pension, and that he cannot be without deed. And therefore, in such case, the parson is not obliged to resign until the prior hath tendered him a deed of the said pension, by which he might be sure of it.¹

SHALES v. SEIGNORET.

IN THE KING'S BENCH, EASTER TERM, 1699.

[Reported in 1 *Lord Raymond*, 440.]

COVENANT upon articles of agreement. The plaintiff declares that it was covenanted and agreed between him and the defendant that he, in

¹ "If a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform." Per Maule, J., *Sands v. Clarke*, 8 C. B. 751, 762, citing *Mayne's case*, *supra*; and see *Newcomb v. Brackett*, 16 Mass. 161.

consideration of twenty guineas by the defendant to him then paid, should transfer to the defendant before or upon the 19th of November, 1695, 1,000*l.* of bank stock; and that the defendant covenanted with the plaintiff to accept it upon notice of three days, and to pay to the plaintiff for it 940*l.* and then the plaintiff avers that no bank stock is transferable by law but in the office of the Bank of England, in the presence of both the parties; and that he gave three days' notice to the defendant that he would transfer to him the bank stock in the office of the Bank the 19th of November; and that he attended there the whole day to have transferred it; but that the defendant did not come to accept it; for which he brings this action for the 940*l.*, &c. The defendant, after oyer of the articles, pleads that the plaintiff nor none of his assigns had any interest in any bank stock upon the 18th of November, &c. The plaintiff demurs. And the whole Court was of opinion that the plea was ill; because, though the plaintiff had not any bank stock upon the 18th of November, yet, if he had it the 19th, he might have performed the contract within the time; for the covenant was not that he should transfer any particular 1,000*l.* of bank stock which he had at the time of the covenant, but any 1,000*l.* of stock. But then the whole Court held: 1. (That this action will not lie for the plaintiff in this case, because it appears that the plaintiff has not transferred; and, without transfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid upon the transfer; and, therefore, no transfer, no money.) Co. Lit. 304;¹ Dyer, 371; 2 Mod. 266, *Otway v. Holdips*. But the matter in the declaration might have been a good excuse for the plaintiff, if the defendant had sued him for not transferring the bank stock; or the plaintiff might have assigned his breach in the non-acceptance of the stock by the defendant.² 2. The Court held that it did not appear to the Court but that the bank stock was transferable at another place than at the office of the Bank; for though the act says that no transfer shall be but as the king shall appoint, and the king has appointed it to be at the office of the Bank, and not in any other place; yet that ought to have been pleaded, or, otherwise, the Court cannot take notice of it; and, therefore, notwithstanding any thing that appears here to the contrary, the transfer might have been in any other place; and then a tender ought to have been made to the person. Sir *Bartholomew Shower* and Mr. *Northey* argued for the plaintiff; *Darnall* and *Wright*, king's serjeants, for the defendant.

Judgment for the defendant.

¹ "If a man plead performance of covenants, and the plaintiff reply that he did not such an act according to his covenant, the defendant saith that he offered to do it, and the plaintiff refused it; this is a departure, because the matter is not pursuant; for it is one thing to do a thing, and another to offer to do it, and the other refused to do it; therefore that should have been pleaded in the former plea." Co Lit. 304.

² *Plumb v. Taylor*, 27 Ill. App. 238, *acc.*

TURNER v. SAWDON & CO.

IN THE KING'S BENCH DIVISION, COURT OF APPEAL, JULY 2, 1901.

[Reported in [1901] 2 *King's Bench*, 653.]

APPLICATION by the defendants for judgment or for a new trial in an action tried by KENNEDY, J., with a jury.

The defendants carried on business as cotton-warp agents at Bradford, Yorkshire, and in March, 1898, an agreement was entered into by them with the plaintiff, who was in their employment, which contained the following clauses: "(1) The said G. E. Sawdon & Co. agree to continue to engage and employ the said Ernest Turner as their servant and representative salesman from the 1st day of March, 1898, for a period of four years ending February 28, 1902. . . . (2) The said G. E. Sawdon & Co. further agree to remunerate the said Ernest Turner for his services by a payment to him of a salary of 200*l.* per annum, to be paid in monthly instalments, for the space of two years, and 250*l.* per annum for the remaining two years. . . . (3) The said Ernest Turner agrees to devote the whole of his time to the business of the said G. E. Sawdon & Co., to faithfully serve them as heretofore in soliciting orders and generally in aiding to conduct the business, and not to divulge to any competitor or other person any of the business secrets of the said G. E. Sawdon & Co. whilst in their service, and to carefully obey their directions from time to time, and will keep, protect, and promote the success of the said business as far as he can. . . ."

The plaintiff acted as salesman for some time; but on December 31, 1900, a letter was handed to him by the defendants, which was as follows: "(We have decided that you shall take a month's holiday — that is to say, that although you will still be in the employ of the firm and at their disposal, you will not after to-day be required to perform any duties. You will please call for your salary on January 31, when any further instruction will be given you." The plaintiff came to the office of the firm on the following day, but was requested to leave. Immediately afterwards circulars were issued by the defendants to their customers stating that the plaintiff had no authority to transact any business on their behalf. The plaintiff then commenced business on his own account, and brought this action against the defendants for damages for breach of the agreement of March, 1898, on the ground that the defendants "(after the 31st December, 1900, have neglected and refused, and still neglect and refuse, to continue to engage and employ the plaintiff as their servant and representative salesman, in accordance with the terms of the said agreement.)"

The learned judge left the following questions to the jury: —

(1) Was the plaintiff ready and willing to perform the agreement according to its terms? Answer, Yes.)

(2) Did the defendants' conduct on December 31, 1900, and January 1, 2, 3, and 4, 1901, constitute a breach of their obligations under their contract towards the plaintiff? Answer, Yes.

(3) Was it such a substantial breach as to justify the plaintiff in treating it as a refusal on the part of the defendants to perform and abide by the contract? Answer, Yes.

(4) If the above questions are answered in the affirmative, what damages is the plaintiff entitled to? Answer, 125*l*.

On further consideration, the learned judge gave judgment for the plaintiff for the amount of the damages found by the jury.

The defendants appealed.

A. L. SMITH, M. R. This is an action tried before my Brother Kennedy with a special jury. The matter has given rise to some complication, chiefly, as it appears to me, because the learned judge left the construction of an agreement to the jury. There was no term of art and no question of custom the meaning or the existence of which might properly be left to the jury. It was for the judge at the trial to construe the written agreement, and we have now to say what construction should be put upon it. I do not say that the meaning of the document is clear, but I have arrived at the conclusion that the result of the trial was not right. (The action is by a man who was in the employment of the defendants, and it was not brought for wages, because it is clear that the defendants were always ready and willing to pay all that was due under the contract.) The real question which the plaintiff thought to raise, and which was raised, was whether beyond the question of remuneration there was a further obligation on the masters that, during the period over which the contract was to extend, they should find continuous, or at least some, employment for the plaintiff. In my opinion such an action is unique — that is an action in which it is shown that the master is willing to pay the wages of his servant, but is sued for damages because the servant is not given employment. (In *Turner v. Goldsmith*,¹ the wages were to be paid in the form of commission, and that impliedly created a contract to find employment for the servant.) This contract is different, being to employ for wages which are to be paid at a certain rate per year. I do not think this can be read otherwise than as a contract by the master to retain the servant, and during the time covered by the retainer to pay him wages under such a contract. It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. (It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term.) To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract

¹ 1891, 1 Q. B. 544.

to keep the servant in the service of his employer in such a manner as to enable the former to become *au fait* at his work. In my opinion, no such obligation arose under this contract, and it is a mistake to stretch the words of the contract so as to include in what is a mere retainer an obligation to employ the plaintiff continuously for the term of his service. I asked whether the employment must be *de die in diem*, and the answer was that this was not necessary, but I could not gather what, short of this, was the suggested obligation. (It seems to me that the only argument open to the plaintiff was that his employment should be continuous, and I cannot find that obligation in the contract.)

I think, therefore, that the case should not have been left to the jury, and that we ought to direct that judgment be entered for the defendants.

VAUGHAN WILLIAMS, L. J. I entirely agree. In my opinion, if the facts are taken to be exactly in accordance with the plaintiff's evidence, there was no case to go to the jury. So far as the pleadings are concerned, the action is for breach of the terms contained in a written contract. It was put on behalf of the plaintiff that the action was based on a repudiation by the master of the contract with the plaintiff, and it was said that the plaintiff had a right to treat the case as if it were an action for wrongful dismissal, and is entitled to recover damages on that footing none the less because the master has been ready and willing to pay the wages agreed upon. For the purposes of my judgment I accept that suggested basis of action, but I still say that there was no case to go the jury.

The first clause of the agreement contains the words "engage and employ," and the argument for the plaintiff is that because these words are used some obligation is thrown on the master which is not ordinarily created by the relation of master and servant. If it is said that the word "employ" must be so construed, the authority against this view is conclusive. In *Emmens v. Elderton*,¹ the plaintiff, who was an attorney, was to receive 100*l.* a year as attorney and solicitor of a company. The promise set out in the second count was to "retain and employ" the plaintiff as attorney. The only matter that had to be argued in that case was whether the expression "retain and employ" added anything to the duty of the company towards their solicitor as expressed in the earlier part of the count. If it did, then the count was a bad one, and though the verdict of the jury had been for the plaintiff the defendant would have been entitled to have the verdict set aside. If, however, the words added nothing to the ordinary obligation on the company, the count was good. It was held in the Exchequer Chamber and in the House of Lords that the words did not of necessity add a jot to the contractual obligation of the employer. This is clearly set out in the opinions delivered by Crompton and Wightman, JJ., in the House of Lords. We have to consider in the present case whether there is anything in this agreement to engage and

¹ 13 C. B. 495; 4 H. L. 624.

employ the plaintiff which places on the defendants a wider obligation than that which a master ordinarily incurs towards his servant. (I think that the first clause of the agreement is merely a clause of engagement or retainer.) The second clause relates to remuneration, and the third to the duties to be performed by the servant in return for the remuneration.) Of course, when a servant is engaged the capacity in which he is engaged is mentioned, and I do not think that the expression "representative salesman" which occurs in the agreement makes the case any stronger or throws any further obligation on the master. The case of a servant who is to be paid by commission as in *Turner v. Goldsmith*, is entirely different. There the master is bound to give the opportunity of earning the remuneration. In *Bunning v. Lyric Theatre, Limited*,¹ there is a good deal in the terms of the contract to show that the having an opportunity of appearing as musical director was one of the considerations which the servant bargained that he should have from the master.

As my Lord has said, it was the duty of the judge to construe this contract, and we must now put a construction upon it. Looking at the matter in the way that is most favorable to the plaintiff, I think that there was no case to go to the jury, and that judgment should be entered for the defendants.

STIRLING, L. J. Throughout the argument and at the present moment I feel more doubt as to the construction of this contract than my learned brethren. (It is an agreement by which the defendants agreed to engage and employ the plaintiff, and the plaintiff agreed to devote the whole of his time to their service.) The question is, What is the meaning of the word "employ" as used in this agreement? It seems to me clear, and if authority be required we find it in the case of *Emmens v. Elderton*, that the word "employ" is capable of two meanings — to retain in service, or to give actual work to be done by the person employed. There are many cases in which the nature of the work to be done shows which of these meanings should be adopted. Take the case of a medical man engaged for a term at a fixed payment. No one would say that employment must be found for him. On the other hand, in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be that there is an implied obligation on the part of the master to afford such an opportunity: *Fechter v. Montgomery*.² So in the case of a commission agent, to which reference has been made. The term "employ" being one with a flexible meaning, I feel the force of the argument that the plaintiff was to be employed in the capacity of salesman to serve and to solicit orders, and so there should be a correlative duty on the employers to give him the opportunity of doing this. There was evidence given at the trial that in order that a salesman may duly perform his duties he must be in constant contact with the market. In that state of things there is some approximation to the case of an

¹ 71 L. T. 396.

² 1863, 33 Beav. 22.

actor; but, as there are other elements pointed out by my learned brethren to which they attach weight, I am not prepared to differ from the conclusion at which they have arrived.

*Appeal allowed.*¹ ✓

LAIRD v. PIM AND ANOTHER.

IN THE EXCHEQUER, JANUARY 18, 20, 1841.

[Reported in 7 *Mason & Welsby*, 474.]

ASSUMPSIT. The first count of the declaration stated, that on the 6th day of April, 1836, in consideration that the plaintiff, at the request of the defendants, would sell them a lot or parcel of land, situated between Bidston Road and Cleaveland Street, in the county of Chester, at the price or rate of 7s. 6d. by the square yard, to be paid as soon as the conveyance thereof should be completed, with interest thenceforth on such purchase-money at the rate of 5l. per cent by the year until paid, the defendants to have the liberty of making bricks and erecting steam-engines on such lot or parcel of land, the defendants promised the plaintiff to purchase the said lot or parcel of land of the plaintiff, and to pay him for the same at the rate or price and on the terms aforesaid. And the plaintiff says that although the plaintiff, relying on the said promise of the defendants, did, within a short and reasonable time from the making of the said promise, to wit, on the day and year aforesaid, allow and permit the defendants to enter into and take possession of the said lot or parcel of land, and

¹ In Smith's Leading Cases (11th Eng. ed.), II. 48, it is said of the rights of a servant wrongfully dismissed:

"1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately: *Pagani v. Gandolfi*, 2 C. & P. 370; *Brace v. Calder*, [1895] 2 Q. B. 253.

"2. It was once thought that he might wait till the termination of the period for which he was hired, and might then sue for his whole wages as a debt due to him in respect of complete performance of the contract on his part, relying on the doctrine of constructive service: *Gandell v. Pontigny*, 4 Camp. 375; see *Collins v. Price*, 5 Bing. 132; *Smith v. Kingsford*, 3 Scott, 279; but the opinions expressed in *Smith v. Hayward*, 7 A. & E. 544; *Fewings v. Tisdal*, 1 Ex. 295, and *Emmens v. Elderton*, 4 H. L. C. 624, make it now clear that this remedy is not open to him, for he cannot allege that the defendant is indebted for *work done*. It did not follow from *Fewings v. Tisdal* that a special action of debt averring a contract to pay, a continuing readiness on the servant's part during all the period to serve, and a dispensation from the service by the master, might not be maintained; see *per CROMPTON, J.*, *Emmens v. Elderton*, *supra*. But it seems to be clear now that this remedy is not open to him; see *Brace v. Calder*, *supra*. See also *James v. Evans*, [1897] 2 Q. B. 180.

"3. He may treat the contract as rescinded, and may immediately sue on a *quantum meruit*, for the work actually performed: *Planché v. Colburn*, 8 Bing. 14; but in that case as he sues on an implied contract, arising out of actual services, he can only recover for the time that he actually served."

See further Sutherland on Damages (2d ed.), II. § 692, *et seq.*

the defendants did, to wit, then, take such possession thereof, and have continued in such possession for a long time, to wit, hitherto; and although the plaintiff, from the time of making the said promise to the commencement of this suit, has performed and fulfilled every thing on his part to be performed and fulfilled, and has always been ready and willing to make appear to the defendants a good and sufficient title in, and right and power to convey, the said lot or parcel of land in fee-simple, together with the liberty aforesaid, and to execute and complete a conveyance thereof in fee-simple to the defendants, together with the liberty aforesaid; and after the expiration of a reasonable time and before the commencement of this suit, to wit, on the 28th of October, 1837, offered the defendants to execute and complete a conveyance thereof, together with the liberty aforesaid, to the defendants, and would then have tendered to the defendants a draft of a proper conveyance, and also a proper conveyance for the purpose aforesaid, but that the defendants then discharged the plaintiff from so doing; or all which the defendants, from the time of making the said promise, have had notice: yet the defendants did not regard their said promise, and did not nor would pay the plaintiff the said purchase-money for the said lot or parcel of land, together with the said liberty, or any part thereof, at or after the expiration of the said reasonable time as aforesaid, or at any other time, but have wholly neglected and refused so to do; and the plaintiff has been and is wholly deprived of the said purchase-money, amounting to a large sum. to wit. 4.125/.. together with interest thereon. to which he ought and otherwise would have been entitled as aforesaid. There were also counts for use and occupation, goods sold and delivered, and upon an account stated.

The defendants pleaded *non assumpsit*, and several special pleas, of which the sixth plea (to the first count) was, that no conveyance of the said lot or parcel of land or any part thereof has ever been made or executed or completed to them the defendants or either of them, or to any person on their behalf, or in any manner whatsoever. Verification.

The plaintiff took issue on all the pleas except the above, to which he demurred generally, and the defendants joined in demurrer. The point stated for argument by the plaintiff was as follows: The plaintiff contends that the execution of a conveyance was not a condition precedent to his maintaining this action, and that if it were, it has been waived, and that consequently the plea demurred to is bad. The defendants' points were as follows: The defendants will contend that the plea is a sufficient answer to the first count of the declaration, and they will also contend that the first count is insufficient, inasmuch as it shows no sufficient breach of the contract stated in that count; and also that the statement in the declaration, that the plaintiff offered to execute a conveyance, and would have tendered one, but that the defendants dispensed with it, is no sufficient ground for alleging as a breach that the defendants did not pay the purchase-money; and that

upon the promise stated in the first count, the non-payment of the purchase-money is no breach of contract as alleged in that count; and that the breach alleged in the first count and the claim to damages as therein stated are not warranted by the premises or allegations in that count.

The cause came on for trial upon the issues in fact before ROLFE, B., at the last Liverpool Assizes, when it appeared that the defendants (who were directors of a company called the Saw-Mills and Timber Company, for which the purchase was made) had been put into possession of the land under the agreement, and had taken therefrom and sold a quantity of brick clay. (They subsequently refused altogether to complete the purchase, upon which the plaintiff brought this action for the recovery of the purchase-money, and for the value of the clay so taken and sold.) It was contended for the plaintiff at the trial that the amount of the purchase-money agreed on, with interest, was the proper measure of damages on the first count. For the defendants it was insisted, that the plaintiff could not be entitled to recover the purchase-money, as the land had never been conveyed, and the plaintiff still remained the owner of it as before the agreement for sale to the defendants. (The learned judge was of opinion that the plaintiff could not recover the whole purchase-money, but was entitled on the first count to such damages only as had resulted from the defendants' breach of their contract; and a verdict was accordingly taken for the plaintiff for 750*l.*, made up as follows: 680*l.* for interest on the purchase-money up to the commencement of the action, and 70*l.* for the value of the brick clay. In last Michaelmas Term (Nov. 3d),

Cresswell moved, pursuant to leave reserved by the learned judge, for a rule to show cause why the damages should not be increased by the sum of 4.125*l.*, the amount of the purchase-money. The plaintiff is entitled to recover the full amount of the purchase-money. This is a contract for a specific plot of land, to which the plaintiff has shown a good title, and which he has offered to convey to the defendants in pursuance of the contract. He has a right to consider them as the owners, and to insist on payment of the price. Sir E. Sugden¹ appears to consider that a vendor may recover the purchase-money without having executed a conveyance, where the purchaser has discharged him from so doing. [ALDERSON, B. It is like the case of goods bargained and sold, and an action brought for not accepting them, in which case the damages sustained by the breach of contract can alone be recovered.] There the plaintiff treats the goods as still his own. [PARKE, B. So here, the land is still yours at law; you might bring ejectment for it immediately after this verdict.] In *Hawkins v. Kemp*,² which was an action by the vendors of an estate against the vendee, who had refused to prepare any conveyance as required by the conditions of sale, or to pay the remainder of the purchase-money beyond the deposit, a verdict was given for the whole residue of the purchase-

¹ 1 Vend. & P. 10th ed. 374.

² 3 East, 410.

money. The defendants may afterwards go into equity to compel a conveyance.

PARKE, B. (The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract.) The question is, How much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with and cannot be sold again. The direction of my brother Rolfe, therefore, was quite correct.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

*Rule refused.*¹

The demurrer was now argued by

Cowling, for the plaintiff.

Wightman, for the defendants.

LORD ABINGER, C. B. I think that the breach is informally alleged, and that the words, "that the defendants did not regard their said promise" are not sufficient to constitute a good breach, so as to cure the defect; but the objection, as it arises on general demurrer, cannot prevail. With regard to the averment of the plaintiff's being ready and willing, and having offered to execute a conveyance, the case of *Jones v. Barkley* appears to be an express authority, and must govern the present case. The averment is, that the plaintiff offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. That, coupled with the other allegations in the declaration, is substantially the same as if it had been averred that the defendants had refused to execute a conveyance actually tendered to them. Our judgment must therefore be for the plaintiff.

PARKE, B. I have had considerable doubt on this case in the course of the argument, but I have at length arrived at the same conclusion as that stated by my lord. This declaration is certainly informally drawn, but I think it is sufficient on general demurrer, upon the principle laid down in *Jones v. Barkley*. Upon the facts alleged in this declaration the plaintiff is substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part

¹ *Porter v. Travis*, 40 Ind. 556; *Tufts v. Grewer*, 83 Me. 407, 414; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25, 33-36; *Sanborn v. Chamberlain*, 101 Mass. 409; *Scudder v. Waddingham*, 7 Mo. App. 26; *Wasson v. Palmer*, 17 Neb. 330; *Griswold v. Sabin*, 51 N. H. 167; *Hurd v. Dinsmore*, 63 N. H. 171; *Bowser v. Cessna*, 62 Pa. St. 148, *acc.* (compare *Findlay v. Keim*, 62 Pa. 112).

Goodpaster v. Porter, 11 Iowa, 161; *Alna v. Plummer*, 4 Me. 258; *Oatman v. Walker*, 33 Me. 67 (overruled); *Richards v. Edick*, 17 Barb. 260, 264, *contra*.

As to the rule in the case of sales of personal property, see *Mechem on Sales*, I. 754; *Sutherland on Damages*, II. § 642, *et seq.*

which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him. The distinction which it has been attempted to draw between this case and *Jones v. Barkley* is no distinction at all: it proceeds altogether on the ground that there two contemporaneous acts were to be done on a particular day; but the case is just the same whether two contemporaneous acts are to be done at an indefinite time or on a specified day. The only distinction is, that in that case one simple act was to be done by the plaintiffs, which the defendant discharged them from doing; here, what the plaintiff has to do is somewhat more complicated; first, he is to make a good title, then the defendants are to prepare the conveyance, and the plaintiff to execute it; and the defendants having discharged him from doing that, it is the same as if it had been done. According to *Jones v. Barkley*, therefore, the plaintiff is in the same situation as if he had performed all his part of the agreement; that is, as if he had perfected a conveyance. That is the conclusion to which I have at length arrived, and to which, perhaps, I should not have come but for the case of *Jones v. Barkley*. This is all on general demurrer; had the question arisen on special demurrer, I doubt whether I should have come to the same conclusion.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

RIPLEY v. M'CLURE.

IN THE EXCHEQUER, JULY 6, 1849.

[Reported in 4 Exchequer Reports, 345.]

ASSUMPSIT. The declaration stated, that on, &c., by a certain agreement in writing then made between the plaintiff, a merchant carrying on business at Liverpool, and the defendant, a merchant carrying on business at Belfast in Ireland, the plaintiff agreed to sell and the defendant agreed to buy, on arrival, one-third interest in a cargo of Congou tea by the ship called "The Mary Ann Webb," to include only such part as might be consigned to and for account of the plaintiff, or of certain persons carrying on business by and under the name, style, and firm of Thomas Ripley & Co.; and it was by the said agreement then further agreed between the plaintiff and the defendant, that the said cargo should consist principally of certain descriptions of tea, in and by the said agreement indicated by certain terms in that behalf, &c., that is to say, 480 chests Congou, &c. And it was thereby then further agreed, that the said tea should be delivered in Belfast from the said ship, to wit, to the defendant: and that the rate of freight should be 6*l.* per ton; and that the cost of the said tea should be at invoice rate, with all charges in China, including a commission of not exceeding two

*Indisputable
fact or
binding upon
same.*

See note
2nd instance

and a half per cent at an exchange of 5s. 3d. per dollar; and that insurance and charges of landing and warehouse in Belfast should be put to the debit of the account sales; and that payment for the same should be made equal to four months' cash from the last delivery in Belfast; ~~and that the same agreement should be annulled and of no effect if the following circumstances collectively or separately occurred,~~ that is to say, non-arrival, any engagement made in China that might prevent the plaintiff from carrying it out, the vessel being directed to another port, without power of change on the part of the plaintiff, or any other cause that could not at the time of the making of the said agreement be explained, but what was then perfectly unknown to the plaintiff; and that the teas should be taken at the usual weights, taxes, and allowances in China as per invoice, and insurance to be done thereon at the rate of 5s. per dollar, to pay average in the usual way; and that sales should be made by the defendant of the entire parcel as a joint concern through and through, in the proportions specified, — one-third the defendant's and two-thirds the plaintiff's, on usual terms; and that advice should be transmitted to the defendant, as soon as received, of the arrangements made in China respecting the lading and destination of the said ship, so that if there should be any obstacle to the carrying out of that contract in the vessel having been fixed without power of change, that agreement might be declared cancelled. The declaration then alleged mutual promises, and averred, that afterwards, to wit, on, &c., insurance was done by the plaintiff on the said tea at the rate of 5s. per dollar, to pay average in the accustomed way; and that afterwards, to wit, on the 20th of September, A. D. 1847, the said ship arrived at Belfast with a cargo of Congou tea consigned to and for account of the plaintiff, and consisting principally of such descriptions of tea as in and by the said agreement indicated as aforesaid, and amounting to a large quantity, to wit, 600 tons of Congou tea; that on the arrival of the said cargo at Belfast the plaintiff was ready and willing to deliver the said cargo in Belfast to the defendant, according to and for the purposes of the said agreement, and so that sales should and might be made by the defendant, upon the terms of and according to the said agreement, of the whole of the said cargo, as a joint concern through and through, in the proportions specified in the said agreement, to wit, one-third the defendant's and two-thirds the plaintiff's, on usual terms; and, although advice was transmitted by the plaintiff to the defendant, as soon as received by the plaintiff, of the arrangements made in China respecting the lading and the destination of the said ship, so that if there had been any obstacle to the carrying out the said agreement, or the said ship had been fixed without power of change, the said agreement might have been declared cancelled; and although no such obstacle ever existed; and although the circumstances, on the occurrence of which, collectively or separately, the said agreement was according to the terms thereof to be cancelled and of no effect, did not nor did any or either of them collectively or

separately occur; and although, if the defendant would have observed the said agreement and his said promise, the said cargo of Congou tea would have been delivered in Belfast aforesaid to the defendant according to the said agreement, and the last delivery thereof would have been made more than four months before the commencement of this suit, and the sales of the cargo by the defendant would have been made and completed long before the commencement of this suit; and although the plaintiff, from the time of the said agreement and promise continually until and at and after the arrival of the said ship with the cargo at Belfast, was willing and desirous that the said cargo should be delivered in Belfast to the defendant, for the purposes of and according to the said agreement, and should be sold by the defendant according to the same agreement, and that the same agreement should in all respects be observed, performed, and fulfilled, yet the defendant, before the arrival of the ship with the cargo at Belfast, wholly discharged the plaintiff from delivering the said cargo, according to and for the purposes of the said agreement, in Belfast or to the defendant, and then and thenceforth continually wholly refused to buy the said one-third interest in the said cargo, or to pay for the same interest, according to the said agreement, or otherwise howsoever, or to receive or sell the said cargo, according to and upon the terms of the said agreement, or in any respect whatever to observe, perform, and fulfil the said agreement, and has not received or sold the said cargo, according to or for the purposes of the said agreement, nor paid or delivered any money, bill, note, or security whatsoever, for or in respect of the said third interest in the said cargo, or of any of the matters of the said agreement, &c.; concluding with special damages.

Pleas. First, *non assumpsit*.

Secondly, that the cargo of tea was not, nor was any part thereof, consigned to or for account of the plaintiff, *modo et formâ*.

Thirdly, as to so much of the breach as relates to the discharging the plaintiff from the delivering the cargo, and refusing to buy and pay for the one-third interest in the cargo, to receive and sell the cargo, and to observe, perform, and fulfil the said agreement in manner as in the breach alleged, that the defendant did not discharge the plaintiff from delivering the cargo or any part thereof, or refuse to buy or pay for the one-third interest in the said cargo or any part thereof, nor did the defendant refuse to receive or sell the cargo or any part thereof, or to observe, perform, or fulfil the agreement or any part thereof, *modo et formâ*.

Fourthly, as to so much of the breach as relates to the defendant having, before the arrival of the ship with the said cargo at Belfast, discharged the plaintiff from delivering the cargo, and refused to buy and pay for the one-third interest, and to receive and sell the cargo, and to observe, perform, and fulfil the said agreement in manner as in the breach alleged, that, within a reasonable time after the alleged discharge and refusal, and before the ship with the cargo arrived at

Belfast, to wit, on, &c., the defendant retracted and withdrew the said discharge and refusal, whereof the plaintiff had notice; nevertheless, the plaintiff, from thence and on and ever after the arrival of the said ship with the cargo at Belfast, refused and neglected to deliver, and would not and did not deliver, to the defendant the said cargo or any part thereof according to the said agreement, although the defendant was then ready and willing to receive the same, and the plaintiff ought to, and could and might have then delivered the cargo to the defendant; and the defendant avers that, when he retracted and withdrew the said discharge and refusal, and also when the plaintiff had notice of such retraction and withdrawal of the said discharge and refusal, the ship with the cargo was on her voyage towards Belfast, and the plaintiff had not altered the voyage, course, or destination of the said ship or cargo or any part thereof, or sold or disposed of or dealt with the cargo or any part thereof; nor had the plaintiff in any manner acted on the said discharge and refusal in the said breach mentioned.

Fifthly, as to the residue of the said breach, that the plaintiff was not ready or willing to deliver to the defendant the said cargo or any part thereof, *modo et formâ*.

Sixthly, that the agreement was made through the fraud of the plaintiff.

The plaintiff joined issue on the first, second, third, and fifth pleas, and replied to the fourth, that the defendant did not retract or withdraw the said discharge and refusal, or either of them, nor did the plaintiff refuse to deliver, nor was the defendant ready or willing to receive the said cargo or any part thereof, according to the said agreement, *modo et formâ*. To the sixth he replied, denying the fraud, on which last mentioned replications issues were also joined.

At the trial before Coleridge, J., at the Liverpool Spring Assizes, 1849, the following facts appeared in evidence: The plaintiff was a merchant carrying on business at Liverpool in his own name, and also with another person at Shanghai, in China, as commission agents, under the firm of Thomas Ripley & Co. The defendant carried on business as a merchant and general commission agent at Belfast, under the firm of William M'Clure & Son. (On the 20th of June, 1846, the plaintiff and defendant entered into a joint adventure for importing a cargo of tea from China, in which the defendant was to have one-third interest. An investment in goods was to be made to purchase the tea, which was to be brought by the ship Mary Ann Webb; and consigned to the defendant at Belfast for sale at the customary commission. On the 7th of October, 1846, the plaintiff wrote to the defendant, inclosing invoice of shipment to China, and stating "the proceeds to be invested in tea for the Belfast market, in which you are to take one-third interest." The plaintiff subsequently wrote to the defendant, representing that the adventure was likely to prove a loss, and offering to release him from his engagement. [Some correspondence then took place, and ultimately this contract was annulled by mutual consent, and on the 16th of

March, 1847, the agreement set out in the declaration was substituted. The defendant became dissatisfied with this agreement, and proposed to the plaintiff to cancel it, and set up the first contract. A long correspondence ensued, in which the defendant alleged, that he had been induced to abandon the first contract and enter into the subsequent agreement by reason of the misrepresentations of the plaintiff. On the 1st of July, 1847, the plaintiff sent to the defendant copies of the invoices of the tea, in a letter containing the following passage: "I have had it from yourself, that you do not intend to comply with the conditions of the contract for the purchase of one-third of this cargo, a threat which I am inclined to believe you do not intend to act upon." On this subject you will please give me your opinion in writing, and I shall be glad if you will assign your reasons for choosing such a course, when the contract on my part will be fulfilled to the letter." No answer having been returned to this letter, the plaintiff, on the 26th of August, again wrote to the defendant thus: "As regards the Mary Ann Webb, there is nothing left for me to do but to send her to some other port than Belfast, since you have declined to fulfil your contract." On the 30th, the defendant wrote in reply: "As to the cargo of the Mary Ann Webb, to one-third of which we still think we are entitled under our first contract, we observe you now intend to send it to a different port. I am willing, and, such being the case, I am glad this unpleasant matter should be thus ended; (and I am willing to waive any claim I may have under either the first or second contract.)" In reply, the plaintiff wrote that it was not his intention to release the defendant from his contract of purchase. On the 1st of September, the defendant wrote to the plaintiff as follows: "I give you notice, that I am entitled to have these teas delivered at Belfast, either under the first or second contract, and that, if you fail to deliver them accordingly, I shall hold myself released from all contracts respecting them." On the 21st of September, the Mary Ann Webb arrived in Belfast Lough with the cargo of tea on board; and the defendant, having been informed of it, wrote to the plaintiff, stating that he was "willing to dispose of the cargo and appropriate the proceeds according to the interests of both parties therein." The defendant also on the same day served the captain of the vessel with a copy of this letter. In consequence, however, of directions from the plaintiff, the vessel sailed from Belfast on the 24th of September for London, without delivering any portion of her cargo to the defendant. The copy of the invoice sent to the defendant was headed thus: "Invoice of Congou tea shipped on board the Mary Ann Webb, Silk, master, for Belfast, and consigned to Thomas Ripley, Esq., Liverpool." It afterwards appeared that, in the heading of the original invoice, the words "on account and risk of Messrs. M'Clure & Son and Thomas Ripley" were inserted after the word "Belfast." The bills of lading stated that the goods were bound for Belfast market, and consigned unto Thomas Ripley or his assignee.

It was submitted, on the part of the plaintiff, that the above corre

spondence proved that the defendant had refused to perform the contract declared on, and had discharged the plaintiff from delivering the tea at Belfast. On behalf of the defendant it was contended, that he had not refused to perform the contract in question, and that, so far from discharging the plaintiff from delivering the tea at Belfast, he had insisted on the plaintiff delivering it there.

With respect to the second issue, the learned judge told the jury that the fact of the teas being stated to be shipped on the joint account did not preclude them from finding that they were consigned to the plaintiff, the invoicing them on the joint account having been done by mistake by the correspondent in China, who was ignorant of the fact of the first contract having been rescinded, and of the goods being consigned to the plaintiff, and coming home on the plaintiff's sole account.

The following questions were put by the learned judge, in writing, to the jury, who returned the accompanying answers:—

First, Was the plaintiff guilty of any misrepresentation as to the circumstances connected with the former contract, by which the defendant was induced to enter into the second? No.

Second, Did the defendant at any time refuse to perform the second contract? Yes, by implication.

Third, Did the defendant ever withdraw that refusal before the ship arrived at Belfast? No.

Fourth, Was the plaintiff willing to deliver, according to the second contract, down to the time of the defendant's refusal to perform the contract? Yes, but not after the arrival of the vessel at Belfast, the defendant having repudiated the contract.

Fifth, To and on whose account were the teas consigned? Thomas Ripley.

On these findings, the learned judge directed a verdict for the defendant on the issue raised by the fifth plea, and for the plaintiff on the other issues.

Knowles, in Easter Term last, obtained a rule on the part of the defendant for a new trial, on the ground of the verdict being against evidence, and also upon the following alleged grounds of misdirection: First, that the learned judge had told the jury, with reference to the letter of the first of July, in which the plaintiff demanded that the defendant should state in writing whether he intended to comply with the contract, that the plaintiff had a right to an answer from the defendant. (Secondly, that the learned judge was wrong in putting the question to the jury whether the defendant at any time refused to perform his contract;) but the question ought to have been, (whether he did so refuse, after the arrival of the vessel at Belfast, and that the learned judge was not correct in directing a verdict to be entered for the plaintiff on the third issue, upon the answers which had been returned by the jury. Thirdly, that the mode in which the question was put to the jury, as to the consignment of the teas to the plaintiff.

was improper. A rule was also obtained to arrest the judgment, on the ground that the fifth plea was found for the defendant, and was a complete answer to the action.)

In the Vacation Sittings, after the last Term (June 19 and 21),

Martin and *J. Henderson* showed cause.

Knowles, *Crompton*, *Unthank*, and *Mellish*, in support of the rule.

The judgment of the Court was now delivered by

PARKE, B. A motion for a new trial was made in this case, on the ground of misdirection, and the verdict being against evidence. Also a motion to arrest the judgment, on the ground that the issue on the fifth plea was found for the defendant, and was an answer to the action. (After stating the pleadings, his lordship proceeded): According to the statement of the contract in the declaration, and as it was proved, it was an executory contract to purchase one-third of a cargo of teas exported from China, capable of being ascertained, such purchase to be made on certain contingencies, viz., the arrival of the cargo at Belfast, the absence of previous contracts in China affecting the cargo, and other circumstances mentioned in the agreement. It is clear, therefore, that the property did not pass by the contract, and the delivery of the cargo by the plaintiff as vendor to the defendant as vendee, — not a mere readiness to deliver after arrival, — was a condition precedent to the plaintiff's right to recover the price, for that price was payable, not on, but after delivery. It also appeared on the trial, and is a most important element in the consideration of the case, and is a key to many ambiguous parts of the defendant's conduct in the transaction, that there had been before a contract of partnership in an outward adventure, and the cargo expected in return for it by the same vessel, for which the contract declared upon, being a contract of purchase and sale, was substituted. The liability to perform the contract of purchase, and its non-performance, not that for a partnership in a joint adventure, was the question in the case. (One defence was fraud in obtaining the second contract by false representations as to the probable result of the first, which defence was not made out.) The other is the one with respect to which a misdirection is alleged to have taken place. This was in two particulars: the first was, that the question which the learned judge left to the jury, as to the non-performance of the contract, was, whether the defendant refused at any time to fulfil the second contract, not whether he refused after the arrival; and secondly, that, as to the question whether he refused or not, the learned judge told the jury that the plaintiff had a right, before the arrival of the cargo, to a distinct answer whether the defendant would fulfil the contract or not.

As to the latter point, if this had been laid down as a proposition of law, it would certainly not have been correct. (The defendant was not bound to do any thing before the arrival.) But it was contended, that this was only an observation made by my brother Coleridge on the facts, and amounted merely to this, that, in the intercourse of merchants

under the circumstances of the case, ~~a letter from the plaintiff to the defendant, containing a request for such an answer, ought to have been answered;~~ and we do not think that my brother Coleridge meant to say more, nor that the jury could have understood him to do so. The other objection requires more consideration.

It was contended, for the defendant, that to constitute a breach of the contract, a refusal at any time was insufficient; that it must be a refusal after the arrival of the cargo; and that the supposed refusal in July, to which the attention of the jury was said to have been directed, and which was long before the contract to buy became absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted. (And we think, that if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect.) We think that point rightly decided in *Phillpotts v. Evans*.

But we cannot collect that the learned judge ever told the jury that a refusal at any time was a breach. He left the questions in writing, whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, which would render the defendant liable, if all the conditions precedent had been performed or waived.) But then it was said, and rightly, that the delivery of the cargo being a condition precedent, the plaintiff was bound to perform it, unless the defendant waived or discharged him from so doing. In the declaration there is an allegation, though informal, of such waiver or discharge, coupled with the allegation of refusal, and an issue upon it in the third plea, and the plaintiff no doubt was bound to prove that waiver or discharge: (we do not feel any difficulty in saying that there was ample evidence of such waiver in the conversation referred to in the plaintiff's letter of the 1st of July, coupled with the whole tenor of the defendant's letters.)

By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me when it arrives at Belfast, as purchaser, for I never will become such;" and this would be a waiver at that time of the delivery; and, if unretracted, would dispense with the actual delivery after arrival.

(And if we look to the correspondence, it is to be inferred from it that the defendant never did mean to perform the contract of purchase at all;) and, consequently, never retracted the waiver of the delivery by the plaintiff as a vendor. It is true that the defendant insists that the cargo shall be delivered at Belfast; and even the alleged parol refusal was probably not intended to be, as Mr. Mellish in his able and ingenious argument with truth contended, any waiver of the delivery at Belfast; it may be taken that the defendant always meant that; but the

true question is not whether the delivery at Belfast was waived, but whether the delivery under the second contract, that is, the contract of purchase and sale, was waived; and we feel no doubt that the defendant, after he had formed the opinion that he had been deluded into a contract of purchase by false representations of the prospects of the original adventure in the first instance, wholly refused to be bound by the contract of sale, and thereby intended to waive the delivery under that contract, and never afterwards retracted the waiver.

This was a question for the jury; and we do not see any reason to think, from the report and the statements of the learned counsel on both sides, that the jury were not in substance properly directed as to the question for their decision; and we are all quite satisfied with their verdict. As to the issue with respect to the consignment to the plaintiff, we think that the learned judge's direction was quite right.

With respect to the motion in arrest of judgment, we think that the verdict on the issue as to the residue is immaterial. If this residue is that part of the breach which is not answered either by the third plea or the fourth, it is in effect no part of the breach at all, for the third plea answers all; there is nothing to plead to, and the plea is idle and irrelevant. If it means the residue not answered by the fourth plea, it is only the readiness and the willingness to deliver after the time that the delivery was excused, and the defendant refused to receive; and readiness and willingness after that time is wholly immaterial. The verdict for the defendant is, therefore, upon an immaterial averment in the declaration.¹

Rule discharged.

CORT AND GEE v. THE AMBERGATE, NOTTINGHAM, AND BOSTON, AND EASTERN JUNCTION RAILWAY CO.

IN THE QUEEN'S BENCH, MAY 27, JUNE 4, 1851.

[Reported in 17 Queen's Bench Reports, 127.]

COVENANT. The declaration stated that, on 14th December, 1846, defendants, then being about constructing the above-named railway, required in that behalf and advertised for certain railway chairs to be supplied to them according to a certain specification then made and published by defendants, and containing and stating therein, &c. The specification was then set forth, describing the required make, weight, and composition of the chairs, and that "the quantity of chairs required was to be 900 tons of joint and 8,000 tons of intermediate chairs; and which were to be delivered at such places and in such proportions as herein-

¹ The judgment of the Court was afterwards affirmed in the Court of Error upon the latter point. [5 Exch. 140.]

after described, to wit, to be delivered out of barges and placed upon a wharf at Radcliffe upon Trent, &c. (other places of delivery for various quantities were then stated); "in the month of February, A. D. 1847, 60 tons at the Grantham Canal Wharf," &c. (naming quantities and places¹); in the month of March in the year aforesaid," &c.; the specification, as recited, then went on to require further deliveries at places and in quantities named, in April, and from thence monthly till November, 1847, inclusive; and again from January to May, 1848, inclusive. The tender was to state a price per ton; payments to be made by the directors of the company one month after delivery, on production of a certificate, from the person appointed by the company to receive and inspect the chairs, that the contract (for the portion) had been duly performed; the engineer to "have full power to alter the deliveries in any way or proportion to the different places before specified, by sending information to the contractor from time to time of the manner in which such deliveries were to be made";² the contractor to be paid according to the prices set forth in his tender. The declaration then averred that plaintiffs, having notice of the premises, did thereupon afterwards, viz., on, &c., propose to defendants to supply them with 3,900 tons of cast iron chairs manufactured from strong mixed iron, subject to the conditions and stipulations set forth in the said specification, and in such proportion of joint chairs to intermediate or single chairs as described therein as aforesaid, and also to deliver the same at such places and in such quantities as stated and described as aforesaid, free from every other charge, and at the rate, &c., (specifying the rates); (And thereupon afterwards, viz., on 28th December, 1846, by a certain contract or memorandum of agreement then made between plaintiffs of the one part and defendants of the other part, and then sealed with the common seal of the defendants, and delivered so sealed as aforesaid to the plaintiffs, and which, &c. (profert), it was agreed by and between plaintiffs and defendants that plaintiffs should and would execute and perform the said proposal according to the conditions and stipulations therein set forth and referred to as aforesaid, and subject to the said specification. And defendants did thereby agree to pay plaintiffs for the said chairs after the rate and in manner above-mentioned. Averment: that plaintiffs afterwards, viz., on, &c., and on divers other days, &c., did, in pursuance and part-performance of the said contract on their part, deliver to defendants, and defendants did accept and receive of and from plaintiffs, 1,787 tons of such chairs as aforesaid; and, although one month from the said respective deliveries of the said chairs had respectively elapsed before the commencement of this suit, and plaintiffs afterwards, and after the expiration of one month as aforesaid, and before the commencement of this suit, viz., &c., produced such written

¹ The quantities were to be from 100 to 356 tons in the whole per month; places of delivery, Grantham Canal Wharf, Bottesford Wharf, Radcliffe Wharf, High Bridge Wharf, and Boston.

² These words were taken nearly verbatim from the specification.

These words were taken nearly verbatim from the specification.

certificates as aforesaid to the defendants in respect of the quantities of chairs so delivered as aforesaid, nevertheless defendants have not paid, &c., and a large sum, viz., 12,100*l.*, is due and unpaid from them to plaintiffs for and in respect of the said chairs so delivered, &c.

And plaintiffs further say that, although they were always, from the time of the making of the said contract until such refusal and wrongful discharge by defendants as hereinafter mentioned, and thence hitherto, ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, and to perform and fulfil the said contract in all things on their part and behalf to be performed and fulfilled, whereof, &c. (notice to defendants), and although defendants, in pursuance and part-performance of the said contract on their part, have accepted and received of and from plaintiffs a certain quantity of the said chairs, to wit, 1,787 tons thereof, and although the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid, hath long since elapsed, nevertheless defendants afterwards, to wit, during the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid, to wit, the 31st January, 1848, wrongfully and injuriously and wholly refused, and have thence hitherto wholly refused to accept or receive of or from plaintiffs the residue of the said chairs so agreed to be supplied to and received by defendants as aforesaid, or any part thereof, according to the form and effect of the said contract or otherwise howsoever, and then and have thence hitherto wholly and wrongfully prevented and discharged plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them the plaintiffs. Whereby plaintiffs have lost all the profits, &c., and have been put to costs in providing, &c., for complete execution of the contract, and were obliged to discharge certain persons (named) from contracts which the plaintiffs had entered into with them for the supply of iron to be used by plaintiffs in making the said chairs, and to pay them compensation.

Plea 1: After oyer of the specification and agreement (the material parts of which appear sufficiently by the declaration): As to the first breach, except so far as the same relates to 159*l.*, parcel, &c., payment by defendants to plaintiffs, and acceptance by them in full satisfaction, &c. Verification.

Plea 2: As to the 159*l.*, payment into court of that sum: which the plaintiffs accepted, and gave a written admission that it covered the balance due for chairs actually delivered.

Plea 3: As to so much of the said declaration as alleges that plaintiffs were ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, defendants say that plaintiffs were not ready and willing to execute and perform the said proposal according to the said conditions and stipulations, and subject to the said

final Dec 1849
Contract made
1848

specification in manner and form, &c. Conclusion to the country. Issue thereon.

Plea 4: As to so much of the declaration as charges defendants with having, during the time limited and appointed for the execution and performance of the said contract by the plaintiffs, refused to accept or receive the said residue of the said chairs, and prevented and discharged the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them the plaintiffs, defendants say that they did not during the said last-mentioned time refuse to accept or receive the said residue, nor did they prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by the plaintiffs in manner and form, &c. Conclusion to the country. Issue thereon.

Replication to plea 1: That defendants did not pay, &c., nor did plaintiffs accept, &c., in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial before Coleridge, J., at the Nottingham Spring Assizes, 1851, it appeared that the plaintiffs, after the agreement declared upon, bought premises. made contracts for iron, and, at considerable expense and by incurring various liabilities, put themselves in a situation to supply the 3,900 tons of iron chairs. The supply was begun; but in September, 1847, when the plaintiffs' bookkeeper, Smith, called upon the company's engineer for money, the engineer, who used to give directions on their behalf as to the delivery of the chairs, requested that the plaintiffs would go on very slowly with the supply, as he did not know how to do, the calls not being paid, and he did not know how far the line would be carried out. Part of the line for which the chairs had been ordered (ending at Boston) was ultimately abandoned. In January, 1848, the engineer stopped the supply for a time, saying he would let the plaintiffs know when more chairs were wanted. The plaintiffs' establishment for manufacturing the chairs was kept up during the suspension, which continued till August. Then the engineer said the company could take a few more, but plaintiffs were to go on slowly. They did so till February, 1849, and were then again stopped till April, when the engineer desired to have a boat-load (if plaintiffs had as many) sent to Radcliffe Wharf, which was done. No more were sent or asked for till December, 1849, when Smith called upon the engineer for money, and he inquired whether plaintiffs had any chairs. Smith replied that they had some which had been made a long time. The engineer said that if plaintiffs had 100 tons, they might send them, but they were not to make any more, as they would not be wanted, for the defendants had as many as were necessary to carry the line to Grantham. Plaintiffs sent all they had, about 53 tons, and no more were sent or required afterwards. During the supply the payments were not made punctually according to contract, nor had the plaintiffs delivered the stipulated quantities of chairs at

the appointed times respectively; (which omission on their part they attributed to the interruptions above stated.) A large stock of iron remained on the plaintiffs' hands, and besides loss in the disposal of it they had to pay money for breaking off engagements which they had themselves made for the purpose of executing this work. The quantity of chairs delivered was 1,787 tons.

[In defence, an endeavor was made to show that the plaintiffs had not the requisite means to complete their contract, and that the delays and final cessation took place with their concurrence.] It was also urged that the engineer was not shown to have had such authority as would make his acts binding on the company. These points were left to the jury, who decided them in favor of the plaintiffs.

(It was further contended that the averment by plaintiffs, in the declaration, of readiness and willingness to perform their contract, was not borne out, inasmuch as the plaintiffs had not offered to deliver, nor had ever made, the residue of the chairs; nor was it proved that the defendants had prevented and discharged plaintiffs from supplying such residue, since it did not appear that the company had impeded the delivery by any active interference, or had countermanded it under their seal or by any authoritative communication. On the first of these points, Coleridge, J., said: '(There is no evidence of any refusal to accept; no evidence of their having said, for example) (We insist upon your completing the contract; and, if you do not, we shall bring an action.) (There is no offer to send the chairs, and no refusal to accept; nor is there the slightest ground for believing that the plaintiffs have ever made these chairs,) but I think the law is not so unreasonable as to compel parties to be at the expense of making these chairs, if those who contracted to purchase have in truth told them they would not accept them; and I think the defendants had given very effective notice that they were not to be made.'" On the second point his lordship said, after reading the material statements of the witnesses: "(Upon this evidence you are to say whether or not the directors refused to accept.) Why, they certainly have not in form; but do they, by any intervention on their part, cause the plaintiffs not to go on to complete the delivery.) If you think that they did, then that issue, like the former, should be found for the plaintiffs; but if you think not, then that issue should be found for the defendants.'" With respect to the authority of the engineer to suspend and stop the work, and the responsibility of the company for his directions, though not warranted under their seal, the learned judge observed: "This contract was entered into under seal by the Ambergate Railway Company, a corporation, on the one part, who are under certain disabilities and disadvantages which do not attach to other people; but the corporation all the way through seem to have been represented by certain individuals; and the most important person with whom they (plaintiffs) have had to do is the engineer; and I think rightly and properly and that he was a necessary man to go between these parties

Without his certificate the plaintiffs could not get any money; and before he would certify, he would have to be satisfied that they had a perfectly flat chair.¹ (I shall advise you very much to consider this case as one, in the particular parts to which I shall draw your attention, in which you should look upon every thing done by the engineer as if it was done by the company itself, as far as the plaintiffs are concerned.) As to the damages, his lordship said that the plaintiffs, if they had a verdict, were entitled to be put into the same situation as if they had completed their contract; and he suggested modes in which the damage upon the whole quantity undelivered might be estimated, but without giving any actual direction upon this subject.

The learned judge read over to the jury the material parts of the evidence on all the points; and they found a verdict for the plaintiffs, damages, 1,800*l*.

Macaulay, in the ensuing Term, moved for a new trial on the ground of misdirection on the points of readiness and willingness, and of prevention; And he also objected to the summing up as to the authority of the engineer, and on the question how far the plaintiffs were shown to have concurred in the stopping of their work.] He cited *West v. Blakeway*,² *Phillpotts v. Evans*,³ and *Ripley v. McClure*. And he contended that the damages were excessive, inasmuch as the verdict was given in respect of all the chairs, whereas some had been undelivered on the appointed days before the final stoppage, and without any compulsion upon the plaintiffs not to deliver them. A rule *nisi* was granted.

Humfrey and *Willmore* now showed cause. The plaintiffs proved that they were ready and willing to deliver all the chairs, if the defendants had not prevented them. There could be no obligation to tender them, after the company had said that they would not be received. The defendants will be obliged to contend that their contract could not be broken but by an order under seal. [LORD CAMPBELL, C. J. That it could not be altered but under seal. PATTERSON, J. The argument will apply only to the discharging.] The plaintiffs had no means of obtaining a discharge under seal. (Discharge of the plaintiffs, or refusal to fulfil their own contract, are, for the present purpose, the same thing.) (To say that a seal was necessary to the discharge is to extend the law as to the making of contracts by a company to the breaking of them, and to require a formal contract for both.) But, further, (the averment put in issue here is that the defendants "refused to accept" the residue of the chairs, and "prevented and discharged" plaintiffs from supplying them.) It is enough if the refusal and prevention be proved. They are an act *in pais* equivalent to a discharge. Otherwise the most formal tender of the chairs would not have entitled the plaintiffs to sue, unless there had

¹ The specification required that the under side of the chair should be "perfectly flat and even on the surface."

² 2 Man. & G. 729.

³ 5 M. & W. 475.

seen an express discharge by the company, and that regularly accepted by the plaintiffs. (Refusal, and the continuance of it, were the questions which went to the jury in *Ripley v. McClure*; and it was held that their finding for the plaintiff entitled him to recover, in an action of assumpsit, for discharging him from delivery of a cargo and refusing to purchase it according to contract.) [LORD CAMPBELL, C. J. You say that it is not necessary here to show that the contract was varied or put an end to: that the act of the defendants was a flat breach of the contract, which dispensed with your performance.] That is so. The ability of the plaintiffs, if they had not been prevented, was amply proved. (The plaintiffs' counsel commented upon the cases of *West v. Blakeway*, and *Phillpotts v. Evans*, cited in moving for the rule, but these are so fully discussed in the judgment of the Court, who took the same view of them, that a further notice of this part of the argument is unnecessary.) As to the specific act of prevention here, the engineer was a person whose proceeding might bind the company, if he had their authority; and this fact was affirmed by the jury. The company's acts must be done through some individual agent: and the engineer, by refusing to certify for the purpose of warranting payment, might individually stop the further delivery. [LORD CAMPBELL, C. J. The company never interfered; and that seems to have justified the jury in finding that his act was theirs.] *Glover v. London and North Western Railway Company*,¹ is an authority for the plaintiffs on this point. As to damages, the learned judge did not dictate to the jury any particular mode of estimating them, but only laid down as matter of law that the plaintiffs should be put into the same situation as if the contract had been fulfilled; which was correct.

Macaulay and *Denison*, contra. (The plaintiffs, in order to recover, were bound to prove a delivery, or something equivalent; the equivalent relied upon was a discharge or prevention, which appear to have been treated at the trial as the same thing. That a mere dispensation by parol would not suffice is clear from *West v. Blakeway*; and the only modes in which the plaintiffs could exonerate themselves from the condition precedent were either a competent dispensation or an actual prevention by the covenantor. "Discharge" in pleading is taken to mean a discharge legally operative; that is, where the obligation is by deed, a discharge by deed.) *Brymer v. Thames Haven Dock and Railway Company*.² What amounts to legal prevention is shown in *Com. Dig. Condition (L. 6)*. "So the performance of a condition shall be excused by the obstruction of the obligee: as if a condition be to build a house; and he, or another, by his order, hinders his coming upon the land." Other instances are then given; and it is added: "But it ought to be an obstruction which disables the performance." What would or would not amount to a disability appears by (*M. 5*) of the same title. [LORD CAMPBELL, C. J. The examples there regard

¹ 5 Exch. 68.² 2 Exch. 549.

conditions to enfeoff; I think they are not much to the present purpose.] There must be a prevention. [LORD CAMPBELL, C. J. Of what? COLERIDGE, J. Suppose a man said, "If you come for such a purpose, I will blow your brains out." That would be no physical prevention. LORD CAMPBELL, C. J. Such a threat might be used ten days before the act was to be done.] Its effect must be judged of by a jury. In *West v. Blakeway*, Tindal, C. J., thought that, if the plea had disclosed "an act which the lessor had done, or which he had compelled to be done," it would have been good. Bosanquet, J., said: "I agree that if the covenantee prevent the performance of the covenant by an act of his own, his right of action for the breach of that covenant is destroyed. But the act, to constitute such a defence, must be the immediate act of the covenantee." And Coltman, J., said that the fallacy in the defendant's argument was its assuming "that there was an act done by the lessor by which the lessee was prevented from performing his covenant." Reference is there made to the case of the Master of St. Catherine's,¹ where the breach of condition by the lessee was caused by an actual ouster and force on the part of the lessor, who afterwards sought to take advantage of the condition; but it clearly was considered that nothing short of such force would be an excuse. No direct authorities as to prevention have been found; but it is evident that there ought to be a prevention in fact, when the party alleging it was ready, and did all that lay in him, to perform his part of the contract. [ERLE, J. There is prevention by a series of acts. COLERIDGE, J. You would not admit such a waiver as was allowed in *Ripley v. McClure*. LORD CAMPBELL, C. J. According to your argument, even a notice under the common seal of the company to send no more chairs would have been insufficient.] That would be a discharge, not a prevention; and the proper mode of doing such act is pointed out by the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.² In *Ripley v. McClure* the point of time at which the breach of contract took effect, was held to be the time when the ship arrived at Belfast, and the cargo was to be delivered and accepted, no intermediate act remaining to be done. A previous refusal, unless the evidence had shown that it continued down to that time, would have been unimportant. The same conclusion may be drawn from *Phillpotts v. Evans*. [LORD CAMPBELL, C. J. According to your view, if the party who contracted to purchase were to say, "I am insolvent, and your finishing the article will be of no use," the vendor could not recover unless he finished and tendered it. ERLE, J. Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board, but defendant wrote word that he could not furnish a cargo: must the ship be sent, to return empty? LORD CAMPBELL, C. J. If it were law, it could not be sense.] In *Planché v. Colburn*³ the defend-

¹ Cited in *Frances's Case*, 8 Rep. 91 b.

² See sect. 92, *et seq.*

³ 8 Bing. 14.

ants had engaged the plaintiff to write a work for publication, but abandoned the publication when the work was partly completed; and the Court of Common Pleas held that he might recover for so much as he had done, without having tendered the work. There it must have been considered that the contract was rescinded, and that the plaintiff might recover upon it for so much as he had been allowed to execute: upon the facts here, a rescinding cannot be assumed, and the plaintiffs, in order to recover, must have carried out the contract. [COLERIDGE, J. Could the contract be rescinded without consent of both parties? The judgment of Bosanquet, J., in *Planché v. Colburn* is against your view. ERLE, J. The Court there do not say that the contract was rescinded.] (*Humfrey* referred to the observations on this case in *Goodman v. Pocock*;¹ and ERLE, J., cited *Elderton v. Emmens*.²)

The learned judge in the present case told the jury to assume that the engineer's acts were authorized by the company; but there was no evidence of their sanction. [COLERIDGE, J. Not by orders under seal; but there was other conduct that showed it.] (The discussion as to the evidence, and the words used by the learned judge, is omitted. LORD CAMPBELL, C. J., said: It was not a direction in point of law: and I should have advised the jury so myself.)

In considering what a corporation may authorize without seal, reference must be had to the nature and objects of the incorporation; that principle was acted upon in *Beverley v. The Lincoln Gas Light and Coke Company*,³ *Mayor of Ludlow v. Charlton*,⁴ and *Paine v. Strand Union*;⁵ and *Ridley v. Plymouth Grinding and Baking Company*⁶ shows how strictly the courts will examine the authority of individuals to bind a joint-stock corporation instituted for the purposes of a special act of parliament. [LORD CAMPBELL, C. J. It appears here that, according to the course of the company's business, it was left to the engineer to manage the affairs in question; and that in those they were represented by him.] *Cox v. The Midland Counties Railway Company*⁷ is another authority for the defendants on this point. [LORD CAMPBELL, C. J. There never was a case reported which admitted of less doubt.]

As to the damages. Until the first actual stoppage, in January, 1848, the plaintiffs might have delivered the chairs on the days specified; if any remained on hand by reason of their omission to do so, it was their own fault; and damages ought not to have been awarded to them for loss of profit on the whole amount finally undelivered, but only on that which they were prevented by express prohibition from delivering on the stated days. (They also contended that, on the amount for which damages might be claimed consistently with this objection, the assessment was not justified by the evidence).

Our. adv. vult.

¹ 15 Q. B. 576, 582.

² 6 A. & E. 829.

³ 2 Exch. 711.

⁴ 4 C. B. 479, 6 C. B. 160, 4 Ho. L. Cas. 694.

⁵ 6 M. & W. 815.

⁷ 3 Exch. 268.

⁶ 8 Q. B. 396.

LORD CAMPBELL, C. J., on a later day of the Term (June 4th), delivered the judgment of the Court.

We are of opinion that the verdict found for the plaintiffs ought not to be disturbed. As to the supposed misdirection, the learned judge at the trial did not direct the jury that in point of law the engineer had authority to bind the company, but only left it to the jury to consider whether, in point of fact, the company by their mode of dealing had authorized and sanctioned his acts. His lordship intimated that he thought the evidence was strong to show that they had done so, but that it was for the jury to give the evidence its due weight. (The objection of misdirection therefore fails.)

Next we have to consider whether the plaintiffs were entitled to a verdict on the issue whether they were ready and willing to execute and perform the said contract according to the said conditions and stipulations, in manner and form, &c.; and on the issue whether the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract. (It is not denied that, if the defendants would have regularly accepted and paid for the chairs, the plaintiffs would have gone on regularly making and delivering them according to the contract;) the objection is that, although the plaintiffs were desirous that the contract should be fully performed, yet, after receiving the notice that the company did not wish to have any more chairs, and would not accept any more, they ceased to make any more, insomuch that the residue which the company are alleged to have refused to accept never were made. (The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract;) that the defendants cannot be charged with a breach of it; that, after the notice from the defendants, which in truth amounted to a declaration that they had broken and thenceforward renounced the contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the company upon them, and to bring them to the appointed places of delivery and tender them to the defendants, who, from insolvency, had abandoned the completion of the line for which the chairs were intended, desiring that no more chairs might be made, and declaring, in effect, that no more should be accepted or paid for. We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense, the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reason-

ably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labor, which might possibly enhance the amount of damages to be awarded against them.

Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "Make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words, "Nor did they prevent or discharge the plaintiffs from supplying the said residue" of the chairs "and from the further execution and performance of the said contract." We consider the material part of the allegation which the last plea traverses to be, that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that "prevent" here must mean an obstruction by physical force; and, in answer to a question from the Court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done except physical force or brute violence? Again, we are told there can be no "discharge" by a corporation, unless by deed under the corporate seal. Of a discharge in one sense of the word this is true. A discharge is sometimes used as equivalent to a release, which must be under seal: *Brymer v. Thames Haven Dock & Railway Company*. But we conceive that, in the allegation traversed by the last plea, discharge only means, like prevent, that the act of the defendants was the cause of the residue of the chairs not being delivered, and of the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs.

It is averred, however, that there are express authorities to shew that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered; that to prevent must be by positive physical obstruction, and that there can be no discharging unless by instrument under seal. The first case relied upon was *West v. Blakeway*, in which, an action being brought by lessor against lessee on a covenant to yield up at the expiration of the term all erections and improvements set up or made during the term, assigning for breach the removal of the sashes and framework of a greenhouse erected during the term, it was held to be a bad plea that there was a subsequent parol agreement between the parties, that if the

Every obligation is dissolved by the same act
by which it was created

lessee would erect a greenhouse, he should be at liberty to pull it down and remove it. But this merely illustrates the well-known rule that a covenant under seal cannot be varied by parol: *Unumquodque ligamen dissolvitur eodem ligamine quo ligatur*. It has no application to a case where the covenantor is prevented from performing the covenant by the covenantee. In 1 Roll. Abr. 453, and in 5 Vin. Abr. 242, 3, tit. Condition (M. c.), will be found various instances of a covenant being discharged without deed by the act of the covenantee.

The next case relied on by the defendants' counsel was *Phillipotts v. Evans*. That was an action of assumpsit for not accepting a quantity of wheat sold early in January, 1839, by the plaintiffs at Gloucester, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof." On the 26th of January the defendant gave notice to the plaintiffs that he would not accept the wheat if it were delivered. It was then on its way by canal to Birmingham; and on its arrival there the defendant was required to accept it, but he refused to do so. The only question at the trial was as to the time with respect to which the damages were to be calculated. The market having continued to fall from the day of the contract till the bringing of the action, the defendant sought to take advantage of his own wrong, and to calculate the damages according to the price in the market on the 26th January, when he gave notice that he intended to break the bargain; but it was very properly held that the plaintiffs were entitled to damages according to the market price when the wheat was tendered to the defendant for acceptance. The Court cannot be considered as having decided that, if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not at their pleasure have treated it as a breach of the contract, and commenced an action against the defendant for not accepting it, without tendering it to him at Birmingham.

The most recent case cited by the defendants' counsel was *Ripley v. McClure*. This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But, in the case at bar, the refusal never was retracted; and therefore there was a continuing breach down to the time when this action was commenced.

Upon the whole we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from

time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract; that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them

We are likewise of opinion that, in this case, the damages are not excessive, (as the jury were justified in taking into their calculation all the chairs which remained to be delivered) and which the defendants refused to accept. They were all included in the declaration and in the issues joined: the time mentioned in the proposal for the delivery of some of them had arrived before the notice was given; but the time of delivery was not of the essence of the contract; and the obligation was still incumbent upon the defendants to accept the whole of the residue.

The rule must therefore be discharged.

*Rule discharged.*¹

¹ *Marshall v. Mackintosh*, 78 L. T. 750; *Leeson v. North British, &c. Co., Ir. R.* 8 C. L. 309; *Anvil Mining Co. v. Humble*, 153 U. S. 540; *McElwee v. Bridgeport Land, &c. Co.*, 54 Fed. Rep. (C. C. A.) 627; *Cherry Valley Works v. Florence, &c. Co.*, 64 Fed. Rep. (C. C. A.) 569; *Martin v. Chapman*, 6 Port. 344; *Baldwin v. Marqueeze*, 91 Ga. 404; *Weill v. American Metal Co.*, 182 Ill. 128; *Riley v. Walker*, 6 Ind. App. 622; *Morris v. Globe Refining Co.*, 59 S. W. Rep. (Ky.) 12; *Lowe v. Harwood*, 139 Mass. 133; *Lee v. Briggs*, 99 Mich. 487; *Armstrong v. St. Paul, &c. Co.*, 48 Minn. 113; *Berthold v. St. Louis Construction Co.*, 165 Mo. 280; *Vicker v. Electrozone Commercial Co.*, 67 N. J. L. 665; *Wharton v. Winch*, 140 N. Y. 287; *Reynolds v. Reynolds*, 48 Hun, 142; *Davis v. Tubbs*, 7 So. Dak. 488, *acc.*

But see *Cox v. McLaughlin*, 54 Cal. 605; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 502; *Palm v. Ohio, &c. Ry. Co.*, 18 Ill. 217; *Howe v. Hutchinson*, 105 Ill. 501; *Lake Shore, &c. Ry. Co. v. Richards*, 32 N. E. Rep. 402 (Ill.; reversed on rehearing 152 Ill. 59); *Beatty v. Howe Lumber Co.*, 77 Minn. 272; *Bethel v. Salem Improvement Co.* 93 Va. 354.

In *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, *BREWER, J.*, in delivering the opinion of the Court said: "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. (Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance.) (Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about.) Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and

Standard contract

ALBERT HOCHSTER v. EDGAR FREDERICK DE LA TOUR.

IN THE QUEEN'S BENCH, JUNE 25, 1852.

[Reported in 2 Ellis & Blackburn, 678.]

DECLARATION: "for that, heretofore, to wit, on 12th April, 1852, in consideration that plaintiff, at the request of defendant would agree with the defendant to enter into the service and employ of the defendant in capacity of a courier, on a certain day then to come, to wit, the 1st day of June, 1852, and to serve the defendant in that capacity, and travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary, to wit, £10 per month of such service, "the defendant then agreed with the plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st day of June, 1852, for three months" on these terms; "and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay the plaintiff" on these terms. Averment that plaintiff, confiding in the said agreement and promise of the defendant, "agreed with the defendant" to fulfil these terms on his part, "and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid." That, "from the time of the making of said agreement of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant, in the capacity aforesaid, on the said 1st June, 1852, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said 1st June, 1852, have entered into the said service and employ of the defendant in the capacity and upon the terms and for the time aforesaid; of all which several premises the defendant always had notice and knowledge:

with last contract.
but was not anticipatory breach.

increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

In *Daley v. People's Building Assoc.*, 178 Mass. 13, 18, HOLMES, C. J., said: "Conduct going no further than the defendant's might not justify even a refusal of further performance on the other side, . . . a right which must not be confounded with rescission and which, in some cases, is more easily made out." See also *Boston Co. v. Ansell*, 39 Ch. D. 339, 365; *Cherry Valley Iron Works v. Florence River Co.*, 64 Fed. Rep. (C. C. A.) 569; *Hayes v. Nashville*, 80 Fed. Rep. 641, 645.

yet the defendant, not regarding the said agreement, nor his said promise, afterwards and before the said 1st June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the said 1st June, 1852, for three months, or on, from, or for, any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his the plaintiff's part, and from being ready and willing to perform the same on the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined his said promise and engagement," to the damage of the plaintiff. The writ was dated on the 22d of May, 1852.

Pleas: 1. That defendant did not agree or promise in manner, and form, &c.: conclusion to the country. Issue thereon.

2. That plaintiff did not agree with defendant in manner and form, &c.: conclusion to the country. Issue thereon.

3. That plaintiff was not ready and willing, nor did defendant absolve, exonerate, or discharge plaintiff from being ready and willing, in manner and form, &c.: conclusion to the country. Issue thereon.

4. That defendant did not refuse or decline, nor wrongfully absolve, exonerate, or discharge, nor wrongfully break, put an end to, or determine, in manner and form, &c.: conclusion to the country. Issue thereon.

On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who in April, 1852, was engaged by defendant to accompany him on a tour, to commence on 1st June, 1852, on the terms mentioned in the declaration. (On the 11th May, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services.) He refused to make him any compensation. The action was commenced on 22d May. The plaintiff, between the commencement of the action and the 1st June, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till 4th July. The defendant's counsel objected that there could be no breach of the contract before the 1st of June. The learned judge was of a contrary opinion, but reserved leave to enter a nonsuit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same term, obtained a rule nisi to enter a nonsuit, or arrest the judgment. In last Trinity Term.

Hannen showed cause. The breach laid is, that defendant, before 1st June, refused to employ plaintiff; (and the averments of readiness and willingness are confined to readiness and willingness until the time when defendant refused to perform his contract.) It is upon these averments that issues are taken; and as they are unquestionably proved, there is no ground for the motion to enter a nonsuit. But the question

which arises on the record is a serious one; and it is, whether in law it is possible to break a contract before the day for its performance comes. The cases relied on by the defendant's counsel will probably be *Leigh v. Paterson*, 8 Taunt. 540, *Phillpotts v. Evans*, 5 M. & W. 475, and *Ripley v. M'Clure*, 4 Exch. 345. But no one of these is an authority for the defendant. In *Leigh v. Paterson*, 8 Taunt. 540, there was a contract by the defendants to supply goods to be delivered in all December. The defendants, on 1st October, announced that they would not so deliver: and, on a writ of enquiry to ascertain the amount of damages, the Secondary ruled that the measure of damages was the difference between the contract price and the market price on 1st October, when the plaintiffs first knew that the defendants would not fulfil their contract. This was held wrong, and it is clear on principle that it was wrong; for the defendants could not by their refusal cast upon the plaintiffs a duty to go at once and purchase goods before the time when they wanted them; and unless such a duty was cast upon them, the measure of damages was the pecuniary difference between the state the plaintiffs were in, having their money and not the goods, and that in which they would have been had the contract been fulfilled, and they had at the time of delivery paid the money and received the goods; the damages therefore clearly depended on the market price at the time when the goods ought to have been delivered. *Phillpotts v. Evans*, 5 M. & W. 475, was, as far as the decision went, a precisely similar case; but it must be owned that there are dicta of Parke, B., in that case which are in favor of the defendant: and in *Ripley v. M'Clure*, 4 Exch. 359, Parke, B., in delivering the considered judgment of the Court of Exchequer, says that it was contended by the defendant's counsel that the refusal, on the part of the defendants in that case, to accept the goods, "which was long before the contract to buy became absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted. And we think that, if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We think that point rightly decided in *Phillpotts v. Evans*, 5 M. & W. 475." (It would seem, from the form of the expression, that the learned judge did not mean to decide that a refusal not capable of being retracted would not be a breach. If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted; and, accordingly, in *Cort v. Ambergate, &c., Railway Company*, 17 Q. B. 127, this court after considering the cases, decided that in such a case the plaintiff might recover, though he was no longer in a position to fulfil his contract. That was a contract under seal to manufacture and supply iron chairs. The purchasers discharged the vendors from manufacturing the goods; and it was held that an action might be maintained by the vendors. It is

Remember time of issuing writ

true, however, that in that case the writ was issued after the time when the chairs ought to have been received. In the present case, if the writ had been issued on the 2d of June, *Cort v. Ambergate, &c., Railway Company* would have been expressly in point. The question, therefore, comes to be: Does it make any difference that the writ was issued before the 1st June? If the dicta of Parke, B., in *Phillpotts v. Evans*, 5 M. & W. 475, are to be taken as universally applicable, it does make a difference; but they cannot be so taken. In a contract to marry at a future day, a marriage by the man before that day is a breach. *Short v. Stone*, 8 Q. B. 358. The reason of this is, that the marriage is a final refusal to go on with the contract. It is not on the ground that the defendant has rendered it impossible to fulfil the contract; for, as was urged in vain in *Short v. Stone*, the first wife might be dead before the day came. [So also, on a contract to assign a term of years on a day future, a previous assignment to a stranger is a breach.] *Lovelock v. Franklyn*, 8 Q. B. 371. [LORD CAMPBELL, C. J. — It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in May incapacitate him from travelling in June? It was possible that he might do so.] [It was; but the plaintiff, who, so long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st June, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did.] In *Planché v. Colburn*, 8 Bing. 14, the plaintiff had contracted with defendants to write a work for "The Juvenile Library;" and he was held to be entitled to recover on their discontinuing the publication; yet the time for the completion of the contract, that is, for the work being published in "The Juvenile Library," had not arrived, for that would not be till a reasonable time after the author had completed the work. Now in that case the author never did complete the work. [LORD CAMPBELL, C. J. — It certainly would have been cruelly hard if the author had been obliged, as a condition precedent to redress, to compose a work which he knew could never be published.] CROMPTON, J. — When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty." This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dis-

missal. They were all considered in *Elderton v. Emmens*, 6 C. B. 160. LORD CAMPBELL, C. J. — The counsel in support of the rule have to answer to a very able argument.]

Hugh Hill and Deighton, contra. In *Cort v. Ambergate, &c., Railway Company*, 17 Q. B. 127, the writ was taken out after the time for completing the contract. That case is consistent with the defendant's position, which is, that an act incapacitating the defendant, in law, from completing the contract is a breach, because it is implied that the parties to a contract shall keep themselves legally capable of performing it; but that an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal; but till then it may be retracted. Such is the doctrine in *Phillpotts v. Evans*, 5 M. & W. 475, and *Ripley v. McClure*, 4 Exch. 345. [CROMPTON, J. — May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?] If he adopts the defendant's notice, which is in legal effect an offer to rescind, he must adopt it altogether. [LORD CAMPBELL, C. J. — So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle.] ERLE, J. — Do you go one step further? Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on 1st June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract? It would be, in such a case, a question of fact for a jury, whether there had not been an exoneration. In *Phillpotts v. Evans*, 5 M. & W. 475, it was held that the measure of damages was the market price at the time when the contract ought to be completed. If a refusal before that time is a breach, how could these damages be ascertained? [COLERIDGE, J. — No doubt it was possible, in this case, that, before the 1st June, the plaintiff might die, in which case the plaintiff would have gained nothing had the contract gone on. LORD CAMPBELL, C. J. — All contingencies should be taken into account by the jury in assessing the damages.] CROMPTON, J. — That objection would equally apply to the action by a servant for dismissing him before the end of his term, and so disabling him from earning his wages; yet that action may be brought immediately on the dismissal, note, 2 Smith's Leading Cases, 8. 20, to *Cutter v. Powell*, 6 T. R. 320.] It is quite possible that the plaintiff himself might have intended not to go on; no one can tell what intention is. [LORD CAMPBELL, C. J. — The intention of the defendant might be proved by showing that he entered in his diary a memorandum to that effect; and, certainly, no action would lie for entering such a memorandum. But the question is as to the effect of a communication to the other side, made that he might know that intention and act upon it.]

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court:—

On this motion in arrest of judgment, the question arises whether if there be an engagement between A. and B., whereby B. engages to employ A. on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement, A. having been ready and willing to perform it, till it was broken and renounced by B. (The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement, before that day, to give a right of action. \ But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short v. Stone*, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford v. Tiley*, 6 B. & C. 325. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. *Bowdell v. Parsons*, 10 East, 359. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. [Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the mean time by the contract, and that they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation.] As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. (In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.) This reasoning seems in accordance with the unanimous decision

of the Exchequer Chamber in *Elderton v. Emmens*, 6 C. B. 160, which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consistent with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852: according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action

before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. Leigh v. Paterson, 8 Taunt. 540, only shows that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to Bowdell v. Parsons, 10 East, 359, might have been brought before that time, as soon as the vendor had sold and delivered them to another. Phillpotts v. Evans, 5 M. & W. 475, was a similar case; and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat, — the court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered; the court professing to proceed upon the rule laid down in Startup v. Cortazzi, 2 C. M. & R. 165, where no question arose as to the right to bring an action before the stipulated day of delivery on a renunciation of the contract. Parke, B., whose dicta are entitled to very great weight, certainly does say in Phillpotts v. Evans, 5 M. & W. 477, with reference to the notice by the defendants that they would not accept the corn: 'I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it.' But the learned judge might suppose that the notice did not amount to a renunciation of the contract; and, if he thought that, after such a renunciation, the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In Ripley v. M'Clure, 4 Exch. 345, it is said that, under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract; but the court intimated no opinion upon the question whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract. And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done. The only other case cited in the argument which we think it necessary to notice is Planché v. Colburn, 8 Bing. 14, which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise; but, before he had completed it, and before the time when in the course

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Anticipatory Breach.

Sec 1337

SECT. II.]

FROST v. KNIGHT.

221/10 Collection

of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract, for want of having completed, tendered, and delivered the treatise, according to the contract. Tindal, C. J., said: "The fact was, that the defendants not only suspended, but actually put an end to, 'The Juvenile Library;' they had broken their contract with the plaintiff." The declaration contained counts for work and labor; but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus showing that, in the opinion of the court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. [If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the mean time by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action; and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

doctrine of convenience.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error. In the mean time we must give judgment for the plaintiff.

Judgment for plaintiff!

FROST v. KNIGHT.

IN THE EXCHEQUER CHAMBER, FEBRUARY 8, 1872.

[Reported in *Law Reports 7 Exchequer*, 111.]

COCKBURN, C. J. This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

¹ *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. D. 460; *Syngé v. Syngé* (C. A.), [1894] 1 Q. B. 466; *Roth v. Taysen*, 73 L. T. 628, *acc.* See, also, *Danube, &c. Co. v. Xenos*, 13 C. B. (N. S.) 825; *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 6 E. & B. 953; *Roper v. Johnson*, L. R. 8 C. P. 167; *Brown v. Muller*, L. R. 7 Ex. 319; *Re South African Trust Co.*, 74 L. T. 769; *Rhymney Ry. Co. v. Brecon Ry. Co.*, 69 L. J. Ch. 813; *Honour v. Equitable Society*, [1900] 1 Ch. 852; *Smith v. Butler*, [1900] 1 Q. B. 694; *Michael v. Hart*, [1902] 1 K. B. 483.

The English doctrine has been followed in Canada. *Dalrymple v. Scott*, 19 Ont. App. 477, 483; *Ontario Lantern Co. v. Hamilton Mfg. Co.*, 27 Ont. 346.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right.

The cases of *Lovelock v. Franklyn*, 8 Q. B. 371, and *Short v. Stone*, 8 Q. B. 358, which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, upheld in this court in *The Danube and Black Sea Co. v. Xenos*, 13 C. B. (N. S.) 825, 31 L. J. (C. P.) 284, went further, and established that notice of an intended breach of a contract to be performed *in futuro* had a like effect.

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, and *The Danube & Black Sea Co. v. Xenos*, on the one hand, and *Avery v. Bowden*, 5 E. & B. 714, 26 L. J. (Q. B.) 3, *Reid v. Hoskins*, 6 E. & B. 953, 26 L. J. (Q. B.) 5, and *Barwick v. Buba*, 2 C. B. (N. S.) 563, 23 L. J. (C. P.) 280, on the other, may be thus stated: [The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.]

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of *Phillipotts v. Evans*, 5 M. & W. 475, and *Ripley v. M'Clure*, 4 Ex. at p. 359, we should have no difficulty in applying the principle of the decision in *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to the present case, were it not for the difference which undoubtedly exists between that case and the present, viz., that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, and that, consequently, the present action is well brought.

The considerations on which the decision in *Hochster v. De la Tour* is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is — and the decision in *Hochster v. De la Tour*, proceeds on that assumption — a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled,

It is a breach of contract.

must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are therefore of opinion that the principle of the decision of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, is equally applicable to such a case as the present.

It is next to be observed that the law as settled by *Hochster v. De la Tour* and *Danube and Black Sea Company v. Xenos*, 13 C. B. (N. S.) 825, 31 L. J. (C. P.) 284, is obviously quite as applicable to a contract in which personal status or personal rights are involved as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into

a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be put an end to. [Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage.] During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. [To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less.] [It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and therefore that, when by terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed.] [We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage.] It is, therefore, manifest that it is better for both parties — for the party intending to break the contract, as well as for the party wronged by the breach of it — that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of *Hochster v. De la Tour*, comes to be ap-

This case is a factor for the general principle of the contract.

plied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of *Short v. Stone*, 8 Q. B. 358, to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of *Hochster v. De la Tour* are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

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[We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochster v. De la Tour* to hold that the present action for breach of the contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise as though the death of the defendant's father — the event on which the fulfilment was to depend — had actually occurred.]

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.¹

JOHNSTONE v. MILLING.

IN THE QUEEN'S BENCH DIVISION COURT OF APPEAL,
JANUARY 13, 1886.

[Reported in 16 *Queen's Bench Division*, 460.]

Appeal from the order of the Queen's Bench Division directing that judgment should be entered for the defendant on the counter-claim for damages to be ascertained by a reference.

The defendant in the action set up a counter-claim for damages for breach of a covenant contained in a lease by which the plaintiff covenanted with the defendant to rebuild the demised premises. The reply stated, among other things, that the plaintiff had not received any notice to rebuild from the defendant as required by the terms of the covenant, and also that the lease was surrendered by the defendant before the time at which the obligation to rebuild would have arisen.

1 Kurtz v. Frank, 76 Ind. 594; *Adams v. Byerly*, 123 Ind. 368; *Holloway v. Griffith*, 12 Iowa, 409; *Lewis v. Tapman*, 90 Md. 294; *Sheahan v. Barry*, 27 Mich. 217; *Burtis v. Thompson*, 42 N. Y. 246; *Brown v. Odill*, 104 Tenn. 250; *Burke v. Shaver*, 92 Va. 345, acc. See also *Trammell v. Vaughan*, 158 Mo. 214; *Stanford v. McGill*, 6 N. Dak. 536.

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O.K. Anticipatory
Breach.*

The action was, after issue joined, remitted to the county court for trial.

The facts with regard to the claim are immaterial to this report.

The facts with regard to the counter-claim appeared at the trial to be as follows: In June, 1881, premises of which the plaintiff was owner, subject to certain mortgages, were demised to the defendant by the plaintiff and his mortgagees for the term of twenty-one years from the 12th day of May, 1880, subject to a proviso for sooner determination of the same, the rent being by the terms of the lease made payable to the plaintiff, until the mortgagees gave notice to the lessee in writing to pay it to them, and, upon such notice being given, to the mortgagees. The lease contained a covenant by the plaintiff that after the expiration of the first four years of the term the plaintiff would, on receipt from the lessee of six calendar months' notice in writing requiring him to do so, forthwith proceed to rebuild the premises within the period and in the manner specified by the covenant. It was provided that the lessee might at the end of the first four, seven, or fourteen years of the lease determine the same by giving to the person or persons for the time being in the receipt of the rent six calendar months' notice in writing of his intention so to do.

The defendant gave the requisite notice to determine the lease at the end of the first four years. He stated in evidence at the trial that during his tenancy he spoke to the plaintiff constantly about getting the money to rebuild the premises; that the plaintiff said he was unable to do so, but that he expected a loan society who had a second mortgage on the premises might advance money; that the plaintiff's declaration of inability to get the money for rebuilding extended over the last two years and a half of the defendant's tenancy; that he made it constantly in answer to the defendant's direct question, and at other times in conversation both before and after the expiration of the four years; and that it was in consequence of such declaration that he (the defendant) gave notice to determine the lease. The defendant further stated that he continued to occupy the premises for about three months after the determination of the lease, paying rent to the mortgagees; that after the lapse of the lease the plaintiff came to him and voluntarily told him that he was utterly unable to find the money; but that he (the defendant) continued the tenancy on the chance of the plaintiff's getting the money.

The county court judge found that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff both before and after the surrender of the lease told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant in consequence of the plaintiff stating that he was and would be unable to find the money for rebuilding the premises surrendered the lease; and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counter-claim.

The county court judge, however, held the contrary, and found a

See Green v. M. & P. Co.

verdict both on the claim and on the counter-claim for the plaintiff, and entered judgment accordingly.

A rule nisi for a new trial was obtained by the defendant in the Queen's Bench Division; and the Divisional Court (Huddleston, B., and Cave, J.), upon the argument of the rule, made the order against which the plaintiff appealed.

Footo, for the plaintiff.

Brooke Little, for the defendant.

LORD ESHER, M. R. The question before us arises entirely on the counter-claim. The claim therein set up is for damages for breach of a covenant in a lease whereby the landlord undertook to rebuild the premises upon notice. It is quite clear that there was no breach of the covenant in the ordinary sense of the term, because no notice to rebuild had been given, and the tenant had exercised the right given him by the lease of putting an end to the term at the expiration of the first four years, and consequently the lease was determined before the time at which the obligation to rebuild under the covenant would have accrued. The lease being so put an end to, it is quite clear that the lessee could not sue the lessor for breach of the covenant in not rebuilding after the expiration of the four years. That being so, the cause of action is thus shaped on behalf of the defendant. It is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he was unable and would be unable to find the money for rebuilding when the time came. It is insisted that such declaration amounted to a declaration of his intention not to perform the contract, and was intended as a repudiation of it, or that, if it was not so intended, the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of the contract; and it is accordingly contended that there was a breach of the contract by anticipation before the time for its performance arrived, for which the defendant was entitled to damages, and that the fact that the defendant afterwards exercised his option of determining the lease is immaterial, for in so doing the defendant only acted for the benefit of the landlord, in order to minimize the damages arising from his repudiation of the contract. The evidence shows, and the county court judge has found as a fact, that the lessor did a considerable time before the expiration of the four years, in answer to the questions of the lessee, repeatedly say that he was unable and would be unable to find the money for rebuilding, and the judge finds that in consequence the defendant surrendered the lease. It appears, however, from the evidence that he did not at once throw up the lease and give the premises into the hands of the plaintiff, but that he waited till the last six months of the four years and then gave the requisite notice to determine the term in accordance with the provisions of the lease. Upon these findings the county court judge decided that the defendant could not maintain his counter-claim. The case then went to the Divisional Court, which held that, either upon those findings, or on the

The lease was determined by the tenant's exercise of his option at the expiration of the first four years.

inferences that ought to be drawn from them, the defendant had a right of action on the covenant, and therefore that the county court judge was wrong. Now on what principle can it be that the defendant had a right of action on the covenant? As I have said, it cannot be on the ground that there was a breach of the covenant in the ordinary sense of the term, because the defendant never gave any notice to rebuild, and he put an end to the term, so that the time when the covenant was to be performed never arrived. Accordingly the defendant had recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455. In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract. We are asked, as it seems to me, by the counsel for the defendant to lay down a new principle, but I do not think we can do so consistently with the established doctrines of law on the subject. We have therefore to consider whether the defendant can bring his case within the doctrine as to anticipatory breach of contract as already laid down. The first question is whether the plaintiff intended to repudiate the contract when he made the statements relied on with regard to his inability to find the money for rebuilding. Did he mean to say that, whatever happened, whether he

came into money or not, his intention was not to rebuild the premises? It does not seem to me that what he said naturally leads to the inference that such was his intention, and I think, having regard to the terms of his finding, that the county court judge declined to draw that inference. If he declined to do so, I think we ought not to do so, unless it is a necessary inference from what the plaintiff said. It does not appear to me that it is. If we ought not to draw that inference from what the plaintiff said, it seems to me to follow as a matter of course that the defendant was not entitled to draw it; and the result is that the defendant fails in the very first point which it is necessary for him to establish, viz., that the plaintiff at the time when he made these declarations of his inability to find the money for rebuilding intended to repudiate his liability on the contract, or that he made use of expressions entitling the defendant to suppose that he did so.¹ [That being so, his case is gone; but, assuming the contrary, then comes the question whether the defendant elected to treat the plaintiff's statement as a wrongful repudiation of the contract. That involves first of all the question whether he could so treat it.] The contract made between the plaintiff and the defendant was the whole lease. [The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease.] That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach could not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract.] Therefore it seems to me that the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But whether he could do so or not, it seems to me that in fact he did not. He did not renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease. I think, therefore, that on every point necessary to establish his counter-claim the defendant fails. For these reasons, with great deference to the Divisional Court, before whom these points do not appear to have been developed so clearly as they have been before us, I think their decision cannot be supported, and that the judgment of the county court judge was correct.

COTTON, L. J. In this case the defendant set up a counter-claim in respect of the alleged breach of a covenant in a lease of premises by the plaintiff to the defendant. The county court judge at the trial arrived at certain findings, upon which he gave judgment in favor of the plaintiff, but which in the opinion of the Divisional Court entitled the de-

¹ See *Rhydney Ry. Co. v. Brecon Ry. Co.*, 69 L. J. Ch. 813; *Smith v. Butler*, [1900] Q. B. 694.

defendant to judgment. By the terms of the lease the obligation of the landlord on the covenant to rebuild the premises could not arise till after the expiration of four years, at which period, under the provisions of the lease, the lessee might, and in fact did, determine the term by six months' notice. Under these circumstances, if an action were brought against the landlord for breach of covenant in respect merely of his not rebuilding after the expiration of four years, it would be impossible to maintain that there was such a breach of covenant, for the covenant clearly is only to rebuild if the defendant continued tenant, and the defendant had himself put an end to the tenancy. But it is said that, before the defendant gave the notice to determine the tenancy and before the end of the four years, matters happened which were sufficient to entitle the defendant to maintain an action on the covenant to rebuild. The county court judge finds that both before and after the surrender of the lease (meaning as I understand, by the term "surrender" the notice to determine the lease), the plaintiff told the defendant that he was unable and would be unable to find the money for rebuilding the premises. The Divisional Court thought that this declaration amounted to such a repudiation of the contract by the plaintiff before the time for performance had arrived as to entitle the defendant in accordance with the doctrine laid down in the case of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to bring an action for breach of the contract. That doctrine seems to be that, where a party to a contract has made statements before the time for performance has arrived importing a refusal to perform or be bound by the contract, the other party, if he chooses, may elect to act upon such statements as a renunciation of the entire contract, and may thereupon treat the same as a breach of the contract and bring his action. If he so elects, his election relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end. The law is thus stated by Cockburn, C. J., in the case of *Frost v. Knight*, L. R. 7 Ex. 111: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, and *Danube and Black Sea Company v. Xenos*, 13 C. B. (N. S.) 825, 31 L. J. (C. P.) 284, on the one hand, and *Avery v. Bowden*, 5 E. & B. 714, 26 L. J. (Q. B.) 3, *Reid v. Hoskins*, 6 E. & B. 953, 26 L. J. (Q. B.) 5, and *Barwick v. Buba*, 2 C. B. (N. S.) 563, 26 L. J. (C. P.) 280, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwith-

standing his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it; on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That expression of the law was cited with approval by Keating, J., in the case of *Roper v. Johnson*, L. R. 8 C. P. 167. (It must be taken therefore that the law is that, when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof, but when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions.)

The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. [And, as at present advised, I am not favorably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But, however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract. (If the county court judge had found that there was such a renunciation, it might have been necessary to decide the other questions as to the effect of it, but all that is stated in the finding is that the plaintiff said that he was and would be unable to find the money for rebuilding. Whether such a statement amounted to a renunciation of the contract must depend on the circumstances of the case and the nature of the contract. (Here the plaintiff, though not a monied man, was the owner of the property included in the lease, subject to mortgages, and there might be, and seems to have been, some expectation on his part of getting the money for the purpose of rebuilding advanced on the property by the mortgagees. (It seems to me that it would be a reasonable construction of his statements that they rather meant that he was afraid, and was under the impression, that he would not be able to get the money, than that he did not intend to perform the contract even if he could get it. The county court judge does not find that he renounced the contract, and, that being so, we ought not, I think, to put that construction on what he said. The evidence, as appearing on the judge's notes, seems to me rather contrary to that construction, because it would seem from the defendant's own evidence that he did not himself so understand the plaintiff's statements, for he says that he

continued the tenancy after the lease expired on the chance of the plaintiff's getting the money. The defendant appears to have thought it on the whole the best course to act on the contract and not to treat it as at an end, but to give notice under it to determine the lease before the time arrived at which the plaintiff's obligation to rebuild was to arise. (It seems to me, therefore, that there was nothing amounting to a renunciation of the contract by the plaintiff, and that, if there were, the defendant did not adopt it, but treated the contract as still existing. For these reasons, I think the decision of the Divisional Court was wrong.

BOWEN, L. J. I am of the same opinion. The question which we have to decide arises with regard to the defendant's counter-claim. The claim made by the defendant is upon a covenant by which the plaintiff undertook, after the expiration of four years from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future. Such being the reason of the thing, the authorities seem all to be the same way. In *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, Lord Campbell thus expresses the doctrine: "But it is surely much more rational and more for the benefit

implied threat

of both parties that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it." In the passage cited by my brother Cotton from *Frost v. Knight*, L. R. 7 Ex. 111, Cockburn, C. J., points out that there are these two alternatives open to the promisee, and that it is a condition essential to his right to sue upon a repudiation of the contract before the time for performance as upon a breach that he should thenceforth treat the contract as at an end except for the purpose of being sued upon. Such being the doctrine on the subject, the question arises whether it is applicable to the case of a lease. It has been decided in *Surplice v. Farnsworth*, 7 M. & G. 576, that a tenant could not throw up his tenancy on the breach of a stipulation that the landlord should put the premises in repair. No one ever yet heard of an attempt to put an end to a lease in respect of a breach of covenant except in cases where the term was made dependent upon the performance of the covenant as a condition. No case has been cited in which it has been sought to apply the doctrine of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. (Q. B.) 455, to such a case as this, or to any case where the promisee sought to keep open the contract after the alleged repudiation by the promisor, and also to sue for damages for such repudiation as for a breach. It is not necessary to decide the point, but I very much doubt whether the doctrine of *Hochster v. De la Tour* is applicable in such a case as this between lessor and lessee. Apart, however, from this question, I think that the court below were wrong with regard to the inferences of fact which they drew. The claim being for wrongful repudiation of the contract, it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract. It seems to me that the county court judge was of the contrary opinion, and, looking to the whole history of the transaction, I cannot say that he was wrong. Unless the language of the plaintiff can only reasonably be construed as importing such renunciation, I think the court below ought not to have disregarded the finding, and treated what the plaintiff said as amounting to a renunciation of the contract within the doctrine to which I have alluded. (Further, assuming that there was evidence to support a finding that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a tittle of evidence to show that the defendant ever elected to treat it as such, and all reason and authority, as I have said, appear to me to show that he must so elect to treat it, in order that it may constitute a breach of the contract. It appears to me, therefore, that the case for the defendant entirely fails. For these reasons I think that the appeal should be allowed.

Appeal allowed.

DINGLEY v. OLER.

OLER AND ANOTHER v. DINGLEY AND ANOTHER.

APRIL 5, 1886.

THIS was an action of assumpsit brought by Dingley Brothers in the Superior Court of the County of Kennebec, in Maine, against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement, whereby, it was averred, the defendants undertook and promised, in consideration of 3,245 ²⁵/₁₀₀ tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendant's ice-houses in the year 1880.

The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of \$7,835.85.

The court found, as matter of fact, that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec River and shipping it thence during the season, that is, while the river was open.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice, and he replied that he did not know about that, delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, "we must, therefore, decline to ship the ice for you this season, and claim our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point."

The plaintiffs, July 10, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants

answered, July 15, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contained this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," &c., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver 3,245 $\frac{3}{4}$ tons of ice from their houses on the Kennebec River during the year of 1880; that the year meant the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery, (and that the letters of July 7 and 15 from the defendants to the plaintiffs contained an unequivocal refusal to deliver any ice during the season,) that the defendants having unqualifiedly refused to ship the ice, this action could be maintained, though brought before the close of the season, but that the damages were not to be reckoned by the price of ice in July; that what the plaintiffs lost was 3,245 $\frac{3}{4}$ tons of ice some time during the season; that the price of ice went down after July to two dollars a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law the plaintiffs below excepted, contending that the right to fix the time for delivery under the contract had vested in them, that it was properly exercised by their demand in July, 1880, that the refusal to deliver at that time constituted the breach of the contract by the defendants, (and fixed the damages at \$5 per ton, the market value of the ice on that day).

The defendants below excepted, contending on their part that the letters of July 7 and 15 did not constitute an unequivocal refusal to deliver any ice during the season, amounting to a renunciation, and, in that sense, a breach of the contract; and that the action was prematurely brought, the right of action, if any, not accruing until after the expiration of the period within which, by the terms of the contract, they had the option to deliver.

The letter of July 7, 1880, from the defendants to the plaintiffs, was as follows:—

BALTIMORE, MD., July 7, 1880.

Messrs. Dingley Bros., Gardiner, Me.:

DEAR SIRS,—As per promise of our W. M. O., we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of Sept 9, 1879, on this head, as follows: "In fact, we do not

Shipping headwater closed

propose for you to become losers on account of extending us this accommodation."

Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so.

We are very sorry indeed that this question should have arisen between us, who have been on such friendly terms hitherto, but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you by taking some) to expect us to give you ice now, worth \$5.00 per ton, when we have letters of yours offering the ice that we got at fifty cents per ton. We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complication should arise between us, and assuring you of our innocence in the matter, we are,

Yours truly,

W. M. OLER & Co.

The letter was answered by Dingley Bros. on July 10, as follows :

GARDINER, July 10, 1880.

Messrs. W. M. Oler & Co., Baltimore :

DEAR SIRS, — Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us.

Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your proposition, made under date of September 6, viz. : —

"It would, of course be more convenient for us to ship this cargo from our own houses ; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you.

"We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo and return same to you next year from our houses."

Upon this we have acted, and in the utmost good faith made sale of the ice ; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery, seems to us hardly right.

Now, whatever the final settlement of this matter is to be, we want you to fill our order ; otherwise we cannot tell what the result might be.

It is not in our minds to do otherwise than right with any one, and certainly with yourselves ; and it is our great desire not to get complicated with the third party in that matter, and assure you that your

regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

Truly yours,

DINGLEY BROS.

The defendant's letter of July 15th was in reply to this, and was as follows:—

BALTIMORE, MD., July 15, 1880.

Messrs. Dingley Bros., Gardiner, Me.:

GENTLEMEN, — Yours of 10th duly received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: (being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences, took more. Now you ask us, at a time when we are pressed by our sales and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends; but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th.

— You do not reply to our arguments, but simply ask us to surrender our well-formed opinion.

Can you reasonably ask us to do this?

[Is not your usually clear and equitable judgment clouded by the manifest considerations of self-interest pressing upon you?]

We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo., and therefore cannot come to see you.

With regards, we are,

Yours truly,

W. M. OLER & Co.

To this no answer was returned, and the present suit was brought six days after its date.

Mr. *Orville Dewey Baker*, for Dingley and another.

Mr. *Bernard Carter*, for Oler & Co.

MR. JUSTICE MATTHEWS, after stating the case as above reported, delivered the opinion of the court: —

We agree in opinion with the Circuit Court, that according to the terms of the contract [the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses.] The language of the contract was that the defendants were to [return the same (the ice) to you next year from our houses.] "Next year," it is not denied, means the shipping season of 1880, during which navigation was open, and in time for the plaintiffs, on notice, to obtain vessels, send them to the ice houses for loading, and get out of the river before it was closed to navigation. The defendants were to deliver, and although that, under the circumstances, required nothing on their part but to be ready for the plaintiffs to receive and load on their vessels, that state of readiness might depend upon other engagements of the defendants in respect to ice in the same houses, so that they had the right under the terms of the contract to consult their convenience as to the particular day when they would furnish to the plaintiffs the ice for shipment. The first and principal act to be done under the contract was to be done by the defendants, that is, the delivery, and the words of the agreement are fully satisfied when that is done at any reasonable time within the season of 1880.

[And this confers upon the defendants, bound to make the delivery, the choice of the time within the period permitted by the contract. *Wheeler v. New Brunswick & Canada Railroad Co.*, 115 U. S. 29.]

We differ, however, from the opinion of the Circuit Court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7 the defendants say: "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. [It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs.] For, in their

answer of July 10, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection," &c. Here certainly was a *locus penitentie* conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now you ask us at a time when we are pressed by our sales, and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair," &c. "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced, and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in *Hochster v. De la Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Danube & Black Sea Railway Co. v. Xenos*, 11 C. B. (N. S.) 152, and which, in *Roper v. Johnson*, L. R. 8 C. P. 167, 178, was called a novel doctrine, followed by the courts of several of the States; *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409; *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Dugan v. Anderson*, 36 Md. 567; *Burtis v. Thompson*, 42 N. Y. 246,¹ but disputed and denied by the Supreme Judicial Court of Massachusetts in *Daniels v. Newton*, 114 Mass. 580, and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

¹ Now followed by the Federal Courts, *Roehm v. Horst*, 178 U. S. 1, affirming 91 Fed. Rep. (C. C. A.) 345, which affirmed 84 Fed. Rep. 565; *Gran v. McVicker*, 8 Biss. 13; *Dingley v. Oler*, 11 Fed. Rep. 372; *Foss, & Co. v. Bullock*, 59 Fed. Rep. 83, 87; *Marks v. Van Eeghen*, 85 Fed. Rep. (C. C. A.) 853. The Supreme Court long remained apparently undecided. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264; *Pierce v. Tennessee, & C. R. Co.*, 173 U. S. 1, 12. See also *Edward Hines Lumber Co. v. Alley*, 73 Fed. Rep. (C. C. A.) 603.

Clark v. National Benefit Co., 67 Fed. Rep. 222, must now be regarded as overruled.

The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

In Smoot's case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed. 424, 2d ed. § 568, that a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery v. Bowden, 5 E. & B. 714, s. c. 6 E. & B. 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone v. Milling, in the Court of Appeals, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract, unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants; for what they said on July 15 amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below judgment will be given that they take nothing by their writ of error.

THOMAS J. DANIELS v. SAMUEL F. J. NEWTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1874.

[Reported in 114 Massachusetts, 530.]

WELLS, J. This action is for breach of an agreement in writing, under seal, for the purchase of certain land from the plaintiff by the defendants. The time for performance is indicated by two clauses, — one that "said premises are to be conveyed within thirty days from this date;" the other that "in case the said parties of the second part should fail to sell their estate at the expiration of the thirty days, then we agree to extend this agreement for thirty days." The inference

from the latter clause is that the defendants were to have the whole thirty days for performance on their part, and, in the contingency mentioned, thirty days more. Such was the effect given to the terms of the written instrument, by the ruling at the trial, and we think correctly.

The plaintiff relied upon a supposed breach of the agreement by the defendants within the thirty days; to wit, May 29, — the writing being dated May 15, — and thereupon had brought his action May 30. The ruling of the court upon this point was that if the defendants “fixed a day, within said thirty days, for the performance of said agreement by the respective parties, and the plaintiff was then ready to perform his part, and the defendants then refused absolutely to perform said agreement on their part, then or at any other time, that would be a breach of the agreement on their part for which the plaintiff can maintain this action.”

We do not understand this ruling to have been based upon the supposition of an oral agreement in regard to the time of performance varying the terms of the written instrument as an executory contract. It would have been clearly erroneous in that aspect; first, because no such substituted agreement is set forth in the declaration; secondly, because such an oral agreement in regard to land would be within the Statute of Frauds, and could not be so enforced.

Subsequent oral agreements in regard to the mode and time of performance of written contracts relating to land are doubtless admissible to affect the question whether the conduct of either party, as proved, constitutes a breach of his written agreement. In that aspect, the evidence adduced by the plaintiff in this case was competent, and might have warranted the jury in finding a breach of the contract by the defendants, if they did not revoke their refusal within the thirty days, even without any further offer to perform on the part of the plaintiff.

The action having been brought immediately upon the refusal, and within the time allowed for performance by the terms of the written contract sued upon, the effect of the ruling was that an absolute refusal of performance, purporting and intended to be a refusal to fulfil the contract at any time, would be of itself a breach of a contract for acts to be done within a time not yet expired, so that an action would lie forthwith. The proposition involved in this ruling, to wit, that there may be a breach of contract, giving a present right of action, before the performance is due by its terms, seems to have been adopted by recent English decisions. *Frost v. Knight*, L. R. 7 Ex. 111 (1872); *Hochster v. De la Tour*, 2 E. & B. 678 (1853).

It is said to be applicable, not only in cases where performance has been rendered impossible by the voluntary conduct of the party, as in agreements for marriage or conveyance of land by marriage or conveyance to another, and by way of exception to the general rule formerly maintained, but to the full extent of a general rule; so that an absolute and unqualified declaration of a purpose not to fulfil or be held by the

contract, made by one party to the other, may be treated as of itself a present breach of the contract by repudiation, as well before as after the time stipulated for its fulfilment by such party. The point was elaborately discussed in *Frost v. Knight* by Lord Chief Justice Cockburn; and the principle evolved is expressed in these propositions on page 114:—

“The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage.”

“The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.”

The first of these two propositions would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. We see no reason for a distinction which should exclude it from the same rule that applies to other promises in writing, in respect to what will constitute a breach of the principal contract between the maker and payee. We are not aware, however, that any decision has carried out the rule by applying it to such contracts; and we doubt if the learned jurists who propounded it would have been willing to follow it to that extent.

The doctrine has never been adopted in this Commonwealth, nor has it received any recognition, so far as we are able to learn, beyond that in *Heard v. Bowers*, 23 Pick. 455, 460. The court in that case refer to *Ford v. Tiley*, 6 B. & C. 325, 327, and 5 Vin. Ab. 224; the doctrine announced in *Ford v. Tiley* being, as it appears to us, an erroneous application of the maxims contained in *Viner*.

A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can of itself constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms

of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. *Frazier v. Cushman*, 12 Mass. 277; *Pomroy v. Gold*, 2 Met. 500; *Hapgood v. Shaw*, 105 Mass. 276; *Carpenter v. Holcomb*, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. *Phillpotts v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Exch. 345; *Lovelock v. Franklyn*, 8 Q. B. 371.

The case of *Ford v. Tiley*, 6 B. & C. 325, cited in *Heard v. Bowers*, was an action on an agreement of the defendant that he would, as soon as he should become possessed of a certain public house, execute a lease thereof to the plaintiff for a term of years from December 21, 1825. There was in fact an outstanding lease of the premises to another, to expire at midsummer, in 1827. Before that term expired the defendant joined with the trustees, who held the legal title, in a lease to another party for twenty-three years. It was held to be a breach of his agreement with the plaintiff, for which an action would lie at once; because the defendant had given up his right to have the possession, and put it out of his power, so long as his own lease for twenty-three years should last. It does not appear that the suit was brought before December 21, 1825; nor that the time when the defendant would become possessed was mentioned in the agreement. It was not the case of an agreement to make a lease at a named future day. The outstanding lease was an extrinsic fact, merely affecting the occurrence of the contingency upon which the performance of the agreement depended; it had no other force in the contract. When, therefore, the defendant made a lease to a stranger he could no longer say that he was prevented from becoming possessed by the outstanding previous lease, because he had put it out of his power to come into possession if that were surrendered or otherwise terminated. The plaintiff's right to have a lease presently was subject only to a contingency of which the defendant had no longer the ability to avail himself. The judgment accords with the rule we have indicated. But in giving judgment, Bayley, J., citing 1 Rol. Ab. 248, 5 Vin. Ab. 225, 21 Ed. IV. 55, and Co. Litt. 221 b, proceeds to say: "Now, if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be a breach of a contract to grant a lease to J. S. at a given day, and *a fortiori* will be a breach so long as the lease to such stranger remains in force."

It seems to us, however, that the reasoning from conditions of forfeiture or defeasance to executory contracts is illogical. If one, having an estate on condition, by his own act in dealing with the estate, puts

it out of his power to perform or comply with the condition, he does what is inconsistent with the terms upon which alone he has the estate, and his grantor may re-enter, even before the time of stipulated performance, not because of a new right acquired by the terms of the agreement, but because the right of the other party having become forfeited or extinguished by his breach of the condition, or violation of the terms of his tenancy, the grantor or feoffor is restored to his former estate and right. It is by virtue of that right or title that he enters, the other party being no longer able to avail himself of his conditional estate or right. The analogy holds good if the plaintiff's right to require performance of the agreement awaits only a contingency which the defendant removes by making it impossible, which was the real case in *Ford v. Tiley*. It gives no support to the very different proposition that, in a contract to be performed on a given day, the voluntary disability of one party will entitle the other to require performance, or to have an action for non-performance, before that day arrives.

The distinction is recognized by the authorities referred to by Mr. Justice Bayley. Lord Coke says: "And herein a diversity is to be observed between a disability for a time on the part of the feoffee and a disability for a time on the part of the feoffor." In the one case, albeit "a certain day be limited, yet the feoffee being once disabled is ever disabled." "And the reason of the diversity is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor or his heirs; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day." Co. Litt. 221 b; 5 Vin. Ab. 224, Condition, B. c.

We have examined with care the opinions of Lord Chief Justice Cockburn in *Frost v. Knight*, and of Lord Campbell in *Hochster v. De la Tour*, and we are not convinced that the conclusions at which they arrive are founded in sound principles of jurisprudence, or sustained by the authorities cited in their support.

Frost v. Knight was an action upon a promise to marry the plaintiff on the death of the defendant's father. The defendant broke off the engagement by announcing his intention not to fulfil his promise. The action was brought without waiting for the death of the defendant's father. The plaintiff having recovered a verdict, judgment was arrested by the Court of Exchequer; but on error it was held, in the Exchequer Chamber, that she was entitled to retain the verdict. The Lord Chief Justice cites *Lovelock v. Franklyn*, 8 Q. B. 371, and *Short v. Stone*, 8 Q. B. 358, as having "established that where a party bound to the performance of a contract at a future time, puts it out of his own power to fulfil it, an action will at once lie." Neither decision cited establishes that proposition, where a definite time for performance is appointed by the terms of the contract; but only where the plaintiff was entitled to require performance upon some previous act or request which the conduct of the defendant has dispensed with.

Short v. Stone was upon a promise to marry the plaintiff "within a reasonable time after request." The defendant married another, and this was alleged as the breach. It was held that request was not necessary, and need not be alleged. It was rendered unavailing, and therefore unnecessary, by the act of the defendant, which was of itself a breach of the contract by rendering performance impossible. No question arose, or could arise, whether the action was premature, because there was no future time certain for performance. The defendant had made the only limit of time impossible.

Lovelock v. Franklyn was upon an agreement to assign a lease, at any time within seven years, upon payment of a sum named. The decision is explicitly upon the ground that the option as to the time, within the seven years, was with the plaintiff. "The defendant is to be ready throughout." Coleridge, J., p. 375. Denman, C. J., says: "Here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more, on the point now before us, than that if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time. We are introducing no novelty. In all the cases put for the defendants the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready." Patteson, J., says: "In this particular contract the defendant has undertaken to keep himself ready for the whole time." So far from being sustained by this case, the proposition to which it is cited by Lord Chief Justice Cockburn is most carefully excluded, if not expressly disavowed.

The proposition, even if established, is not decisive of the case now before us. We have discussed it, however, because it has an important bearing upon the argument, and is essential to the result reached in *Frost v. Knight*. The Lord Chief Justice, taking it as established by the cases cited, proceeds to the next step. He says: "The case of *Hochster v. De la Tour*, upheld in this court in *The Danube & Black Sea Co. Xenos*, 13 C. B. (N. S.) 825, went further, and established that notice of an intended breach of a contract to be performed *in futuro* had a like effect."

Hochster v. De la Tour appears to us to be the only case which sustains this position as an adjudication, although that decision has been recognized in several subsequent cases. *Avery v. Bowden*, 5 E. & B. 714; 6 E. & B. 953; *Wilkinson v. Verity*, L. R. 6 C. P. 206. It was an action upon a contract of hiring to go as courier for the plaintiff from June 1, 1852, at monthly wages. There was notice of renunciation of the employment; and the action brought May 22, 1852, was sustained. Lord Campbell says: "But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a

future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short v. Stone*, 8 Q. B. 358." The statement we have already made of *Short v. Stone* will show how the essential fact in that case is mistaken, and the reason of the decision misapplied. He adds: "If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford v. Tiley*, 6 B. & C. 325." We have already shown in what manner *Ford v. Tiley* fails to sustain the position for which it is cited.

In *Bowdell v. Parsons*, 10 East, 359, cited by Lord Campbell, as showing that upon a contract for sale and delivery of goods at a future time, an action "might have been brought before that time as soon as the vendor had sold and delivered to another," the only question was of the necessity of alleging time and place of request to deliver; the plaintiff being entitled to delivery on request.

In *Planché v. Colburn*, 8 Bing. 14, also cited, no time was specified. The plaintiff would have been entitled to his compensation upon performance of the service he undertook, which was the preparation of an article or work for the defendant's periodical publication within a reasonable time. He had begun the work towards performance on his part. Full performance by him was rendered useless, and practically prevented by the defendant's abandonment of the enterprise. The case in reality establishes nothing more than that the plaintiff was entitled to treat the contract as rescinded, and recover for what he had done upon a *quantum meruit*.

Elderton v. Emmens, 4 C. B. 479, 6 C. B. 160, and 4 H. L. Cas. 624, was upon a contract of employment. The plaintiff had entered upon the service and was dismissed. The case recognizes a right of action, founded upon the defendant's obligation to continue the plaintiff in his service, and a breach of that obligation by wrongfully dismissing him. From the opinions of Martin, B., 4 H. L. Cas. 648, and of Talfourd, J., p. 652, it would appear that the action was not brought until after the term of stipulated service had expired. But we conceive that it would have afforded no support to the doctrine for which it was cited, if it had been brought immediately upon the dismissal of the plaintiff; because that was the time for performance of the defendant's agreement to employ the plaintiff, for breach of which the action was brought.

The *Danube & Black Sea Co. v. Xenos*, 13 C. B. (n. s.) 825, by which *Hochster v. De la Tour* is said to have been upheld, was an action upon an agreement by which the plaintiff was to receive and carry freight for the defendant, the shipment to commence on August 1st, and the action was not brought until after August 1st. The only question was whether a repudiation of the agreement, notified to the plaintiff before August 1st, and not recalled, excused the plaintiff from

making an offer to perform on that day, and was sufficient to show a breach of the agreement. The judgment is in accordance with that in *Ripley v. M'Clure*, 4 Exch. 345, and with the plain rule of law that when the plaintiff is prevented by the defendant from performing the service or doing the act which will entitle him to the fruits of his contract he is thereby excused from performance on his part, and is entitled to an appropriate remedy by action. *Scot v. Mainy*, Poph. 109; *Goodman v. Pocock*, 15 Q. B. 576; *Cort v. Ambergate, &c., Railway Co.*, 17 Q. B. 126.

But the question, in what mode and at what time that remedy may be sought, must depend upon the provisions of his contract, and the nature of the rights to which it entitles him, and which are affected by the conduct of the other party. Throughout the whole discussion both in *Hochster v. De la Tour* and *Frost v. Knight*, the question as to what conduct of the defendant will relieve the plaintiff from the necessity of showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of, — the court dealing only with the conduct of the defendant in repudiating the obligations of his contract.

Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of, or prevented from, acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed.

That this is the natural and ordinary rule seems to be recognized by Lord Campbell, when he declares that "it cannot be laid down as a universal rule," and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true "that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." L. R. 7 Ex. 114. But pre-
ceding "inchoate right" is discovered, and a corresponding obligation

implied, upon which there may be held to be "a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it."

In *Hochster v. De la Tour*, Lord Campbell assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance; "they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation;" and "it seems to be a breach of an implied contract if either of them renounces the engagement." In *Frost v. Knight*, the Lord Chief Justice remarks of the promise to marry: "On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties." "Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage."

These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement "by reason of the future non-performance" will be "virtually involved," "as one of the consequences of the repudiation of the contract," it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts, having a future day for their performance, include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfilment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfil their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on

their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action therefore cannot be maintained. *Exceptions sustained.*¹

ISAAC PARKER v. ELECTA P. RUSSELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 24 —
JUNE 28, 1882.

[Reported in 133 Massachusetts, 74.]

CONTRACT. The declaration alleged "that the defendant, in consideration of the conveyance by the plaintiff to the defendant of certain real estate in Deerfield, promised and agreed to support and maintain the plaintiff, furnishing him with all things necessary and convenient in sickness and in health, during the natural life of the plaintiff; that the defendant accepted said conveyance, and has occupied and used said estate, but has refused and neglected and still neglects and refuses to perform her said agreement." Writ dated Sept. 14, 1880. Trial in

¹ Pittman v. Pittman, 61 S. W. Rep. (Ky.) 461; South Gardner Lumber Co. v. Bradstreet, 53 Atl. Rep. (Me.) 1110; Martin v. Meles, 179 Mass. 114; Carstens v. McDonald, 38 Neb. 858; King v. Waterman, 55 Neb. 324; Parker v. Pettit, 43 N. J. L. 512, 517; Stanford v. McGill, 6 N. Dak. 536, acc. See also Perkins v. Frazer, 107 La. 390.

Wolf v. Marsh, 54 Cal. 228; Fresno, &c. Co. v. Dunbar, 80 Cal. 530; Poirier v. Gravel, 88 Cal. 79; Remy v. Olds, 88 Cal. 537; Garberino v. Roberts, 109 Cal. 125, 128; Thomson v. Kyle, 39 Fla. 582; Fox v. Kitton, 19 Ill. 519; Follansbee v. Adams, 86 Ill. 13; Kadish v. Young, 108 Ill. 170; Engesette v. McGilvray, 63 Ill. App. 461; Kurtz v. Frank, 76 Ind. 594; Adams v. Byerly, 123 Ind. 368, 371; Crabtree v. Messersmith, 19 Iowa, 179; Holloway v. Griffith, 32 Iowa, 409; McCormick v. Basal, 46 Iowa, 235; Platt v. Brand, 26 Mich. 173; Sheahan v. Barry, 27 Mich. 217; Kalkhoff v. Nelson, 60 Minn. 284, 287; Bignall, &c. Mfg. Co. v. Pierce, &c. Mfg. Co., 59 Mo. App. 673; Claes, &c. Mfg. Co. v. McCord, 65 Mo. App. 507; Burtis v. Thompson, 42 N. Y. 246; Howard v. Daly, 61 N. Y. 362; Ferris v. Spooner, 102 N. Y. 10; Matthews v. Matthews, 62 Hun, 110; Nichols v. Scranton, &c. Co., 137 N. Y. 471; Stokes v. McKay, 147 N. Y. 223; Union Ins. Co. v. Central Trust Co., 157 N. Y. 633, 643; (conf. Shaw v. Republic L. I. Co., 69 N. Y. 286, 293; Benecke v. Haebler, 38 N. Y. App. Div. 344; Hicks v. British Am. Assur. Co., 162 N. Y. 284; Langan v. Supreme Council, 66 N. E. Rep. (N. Y.) 932); Schmitt v. Schnell, 14 Ohio C. C. 153; Diem v. Koblitz, 49 Ohio St. 41; Stark v. Duvall, 7 Oklahoma, 213; Zuck v. McClure, 98 Pa. 541; Hocking v. Hamilton, 158 Pa. 107; Mountjoy v. Metzger, 9 Phila. 10; Ault v. Dustin, 100 Tenn. 366; Brown v. Odill, 104 Tenn. 250; Burke v. Shaver, 92 Va. 345; Lee v. Mutual, &c. Assoc., 97 Va. 160; Davis v. Grand Rapids, &c. Co., 41 W. Va. 717; Chapman v. Beltz Co., 48 W. Va. 1, contra. See also Trammell v. Vaughan, 158 Mo. 214; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435.

In Benecke v. Haebler, 38 N. Y. App. Div. 344, the Court refused to apply the doctrine of anticipatory breach to the case of a promissory note. See also Honour v. Equitable Soc., [1900] 1 Ch. 852; Greenway v. Gaither, Taney, 227; Flinn v. Mowry, 131 Cal. 481. In Roehm v. Horst, 178 U. S. 1, 17, FULLER, C. J., distinguished the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations.

the Superior Court, before Bacon, J., who allowed a bill of exceptions, in substance as follows : —

The evidence tended to show that, in March, 1873, the defendant, for a good consideration, agreed to support the plaintiff during his life; that she did support him in her house from that time till about Oct. 1, 1878, when her house was destroyed by fire; and that since the fire the defendant had furnished no aid or support to the plaintiff.

The defendant requested the judge to rule that damages could only be recovered in this action for failure to furnish support to the plaintiff prior to the date of the writ; and that damages for such failure since the date of the writ must be sought in another action. The judge declined to so rule, and instructed the jury that if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support and full indemnity for his future support.

The defendant also requested the judge to rule that the plaintiff, under his declaration, could not recover damages for any period subsequent to the date of the writ; but the judge declined so to rule.

The jury returned a verdict for the plaintiff in the sum of \$972.25; and found specially that the support of the plaintiff, under the terms of the contract (from the date of the fire to the date of the writ, was of the value of \$377.40,) and that the same from the date of the fire to the date of the trial was of the value of \$473.60.) In case the plaintiff should not be entitled to damages under the rule laid down by the judge, judgment was to be entered for the one sum or the other, as this court should determine the rule of damages to be. The defendant alleged exceptions.

F. L. Greene, for the defendant.

A. De Wolf, for the plaintiff.

FIELD, J. In an action for a breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. *Fay v. Guynon*, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. *Amos v. Oakley*, 131 Mass. 413; *Schell v. Plumb*, 55 N. Y. 592; *Remelee v. Hall*, 31 Vt. 582; *Fales v. Hemenway*, 64 Maine, 373; *Sutherland v. Wyer*, 67 Maine, 64; *Lamoreaux v. Rolfe*, 36 N. H. 33; *Mullaly v. Austin*, 97 Mass. 30; *Howard v. Daly*, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time.

quantum meruit
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From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained. But it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In *Pierce v. Woodward*, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers v. Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under the St. of 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton v. Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and *Ward v. Rich*, 1 Vent. 108, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn v. Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had

See 1317 Williston.
See 140 Ent v. Amburge.

bound himself to serve the plaintiff for seven years; the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service during the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

Judgment on the verdict for the larger sum.¹

¹ *Pierce v. Tennessee, &c. Co.*, 173 U. S. 1; *Re Manhattan Ice Co.*, 114 Fed. Rep. 399; *Northrop v. Mercantile Trust Co.*, 119 Fed. Rep. 969; *Strauss v. Meertief*, 64 Ala. 299; *Howard Col. v. Turner*, 71 Ala. 429; *Etna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Goldman v. Goldman*, 51 La. Ann. 761; *Sutherland v. Wyer*, 67 Me. 64; *Speirs v. Union Drop-Forge Co.*, 180 Mass. 87; *Cutter v. Gillette*, 163 Mass. 95; *Girard v. Taggart*, 5 S. & R. 19; *King v. Steiren*, 44 Pa. 99; *Chamberlin v. Morgan*, 68 Pa. 168; *Remelee v. Hall*, 31 Vt. 582; *Treat v. Hiles*, 81 Wis. 280. See also *Mayne on Damages* (6th ed.), 106 *et seq.*; *Sutherland on Damages*, §§ 108, 112, 113.

The contrary decisions of *Lichtenstein v. Brooks*, 75 Tex. 196, 198; *Gordon v. Brewster*, 7 Wis. 355 (*conf.* *Treat v. Hiles*, 81 Wis. 280; *Walsh v. Myers*, 92 Wis. 397), are not to be supported. See also *Salyers v. Smith*, 67 Ark. 526.

In *Henry v. Rowell, Exec.*, 64 N. Y. Supp. 488, *aff'd* without opinion, in 63 N. Y. App. Div. 620, the plaintiff and his sister, the defendant's testator, entered into a contract in 1872, by which the plaintiff agreed to board and lodge his sister during her life, and she agreed, in consideration thereof, to leave the plaintiff all the property she should own at the time of her death. She lived with the plaintiff until 1894. She then left, intending not to return, as she made evident at the time. In 1898 she died, leaving the plaintiff only \$100. The plaintiff thereafter began this action. The Court held that the action was barred. GARNOR, J., said: "The plaintiff could not maintain a suit in equity for specific performance, nor an action to recover the value of the property left by the decedent. The only action he could maintain is the one he has brought, i. e. to recover the actual damage he has sustained, which he puts at the value of the board and lodging he actually furnished. The cause of action for that did not arise on the failure of the decedent to leave a will giving the plaintiff all of her property. She had not agreed to leave him all of her property by will for one year's or twelve years' board and lodging, but for continuous board and lodging up to her death. If it had continued up to her death, and she had failed to leave all of her

before the death of the testator

CLARK v. MARSIGLIA.

NEW YORK SUPREME COURT, JULY, 1845.

[Reported in 1 Denio, 317.]

ERROR from the New York Common Pleas. Marsiglia sued Clark in the court below in assumpsit, for work, labor, and materials, in cleaning, repairing, and improving sundry paintings belonging to the defendant. The defendant pleaded *non assumpsit*.

The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair, at certain prices for each. They were delivered upon two occasions. As to the first parcel, for the repairing of which the price was seventy-five dollars, no defence was offered. (In respect to the other, for which the plaintiff charged one hundred and fifty-six dollars, the defendant gave evidence tending to show that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done.) The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for doing the whole, and for the materials furnished, insisting that the defendant had no right to countermand the order which he had given. (The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand.)

The court declined to charge as requested, but on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for the materials furnished.

property to the plaintiff, that breach would have given a cause of action to the plaintiff. But that is not this case. She did not agree to leave to the plaintiff all of her property for twelve years' board and lodging, and her failure to leave it to him therefor was the breach of no contract. Nor did she agree to make a fair compensation by will for twelve years' board and lodging, and her failure to do so was no breach. Hence the cause of action sued upon did not arise upon such failure in either case, it being no breach, but upon the prior breach of the contract which occurred, viz., her said abandonment of it. . . . In cases like the present one where the contract is broken while it is being performed by the parties, the cause of action for the breach which arises at once is the only cause of action which accrues. That the contract is not yet completed is no reason for postponing the commencement of the action to the time when it would be completed if carried out, and reckoning the running of the statute of limitations from that time. The plaintiff here was not at liberty to continue to treat the contract as in life until the decedent's death. He had not the legal right to require or demand that she leave a will giving him all of her property notwithstanding that she had not received the consideration agreed upon therefor; nor that she provide in her will for a fair compensation to him (which he is now suing for) for the amount of board and lodging which she had received from him, for she had not agreed to do that. His only right was to demand of her the damage she became liable to him for by her refusal to go on with the contract."

Compare *Pittman v. Pittman*, 61 S. W. Rep. (Ky.) 461, and see 39 Am. L. Reg. N. S. 428, 560, 678.

The jury found their verdict accordingly, and the defendant's counsel excepted. Judgment was rendered upon the verdict.

C. P. Kirkland, for the plaintiff in error.

A. Taber, for the defendant in error.

PER CURIAM. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. (The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred.) The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. (Such damages would include a recompense for the labor done and materials used and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.)

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. (The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use.) In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer.) The judgment must be reversed, and a *venire de novo* awarded. *Judgment reversed.*¹

¹ "We think the learned circuit judge was right as to the rule of damages in this case. As said by the learned counsel for the appellant, the plaintiffs took no steps to perform the contract after they were notified by the defendant that he refused to perform it on his part. The rights of the parties under the contract were fixed at that time. Whatever the plaintiffs did with the logs after that was wholly immaterial to the defendant, except that the plaintiffs could not refuse to do anything more with the logs, and then charge the defendant in damages for their loss. That the profit which the plaintiffs could have made on the contract, if they had been permitted to perform the same, is the correct rule of damages, and the one most in accordance with equity, is apparent from many considerations. Suppose the defendant had notified the plaintiffs that he repudiated the contract before anything had been done under it. In such case could the plaintiffs have voluntarily gone on and got out the logs and converted them into money, and charged the defendant with the difference between the contract price and the price they sold them for? It seems to us they could not. Their loss in

ZUCK & HENRY v. McCLURE & CO.

PENNSYLVANIA SUPREME COURT, OCTOBER 18, 1881.

[Reported in 98 Pennsylvania State, 541.]

ASSUMPSIT by Zuck & Henry against G. T. Rafferty *et al.*, trading as McClure & Co. The action was brought Nov. 29, 1879, the writ served and narr. filed the same day, to recover \$1,500 due plaintiffs for coke delivered to the defendants during the month of October, 1879, under a written contract. The fact of delivery and the price was not disputed.

On the trial, before Collier, J., the defendants claimed to set off damages sustained by them by reason of the failure of the plaintiffs to comply with a subsequent contract for the delivery of coke from and after Dec. 1, 1879, at a stipulated price. The last-mentioned contract was consummated by correspondence Nov. 11, 1879, performance to begin Dec. 1, 1879. The plaintiff objected to the admission of any evidence relating to the second contract, upon the ground that the time of its performance did not commence until after the bringing of this action, and that consequently damages arising from any breach thereof could not be set off in this action. The court, however, admitted the evidence, which showed the existence of said second contract, and notice given on Nov. 19, 1879, by plaintiffs to the defendants that they could not comply with the same, to which notice the defendants replied in the following letter : —

PITTSBURGH, Dec. 4, 1879.

Messrs. Zuck & Henry, Connellsville, Pa.:

GENTS, — We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works such case would necessarily be the price the defendant had agreed to pay for the lumber, less the cost of its production by the plaintiffs. Can they enhance such damage against the defendant by going on and manufacturing the lumber and selling it at a price which would not pay for the cost of such manufacture, and charge the loss to the defendant? We think not. In the case of the sale of merchandise the damages are limited by the difference in value of the articles sold and the price agreed to be paid therefor, and if the vendor retains the goods sold after the date of delivery fixed on, and afterwards sells the goods for less than they were worth at the time fixed for the delivery, he cannot charge such loss to the defaulting vendee. *Chapman v. Ingram*, 30 Wis. 290, 295." *Cameron v. White*, 74 Wis. 425, 431.

Kingman v. Western Mfg. Co., 92 Fed. Rep. (C. C. A.) 486; *Moline Scale Co. v. Beed*, 52 Iowa, 307 (*conf.* *McAlister v. Safley*, 65 Iowa, 719); *Black v. Woodrow*, 39 Md. 194, 216; *Heaver v. Lanahan*, 74 Md. 493; *Collins v. Delaporte*, 115 Mass. 159 (*semble*); *Hosmer v. Wilson*, 7 Mich. 294; *Gibbons v. Bente*, 51 Minn. 499; *American Publishing Co. v. Walker*, 87 Mo. App. 503; *Dillon v. Anderson*, 43 N. Y. 231; *Lord v. Thomas*, 64 N. Y. 107 (*semble*); *Johnson v. Meeker*, 96 N. Y. 93; *People v. Aldridge*, 83 Hun, 279 (*semble*); *Heiser v. Mears*, 120 N. C. 443; *Davis v. Bronson*, 2 N. Dak. 300; *Ault v. Dustin*, 100 Tenn. 366; *Chicago, &c. Co. v. Barry* (Tenn.), 52 S. W. Rep. 451; *Tufts v. Lawrence*, 77 Tex. 526; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 239; 40 Vt. 257; *Tufts v. Weinfeld*, 88 Wis. 647, *acc.*

Roebbling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 660, *contra*. See also *Southern Cotton Oil Co. v. Heflin*, 99 Fed. Rep. (C. C. A.) 339; *Lake Shore, &c. Ry. Co.*, 152 Ill. 59.

(forty ovens) ; also product of ovens that may be built during the continuance of the contract from Dec. 1, 1879, to May 31, 1880, inclusive, and to advise you that we have been and *are now prepared to receive the coke under said contract.* If shipments on our account are not *at once* commenced, we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract. Yours most respectfully,

McCLELL & Co.

The defendants then proved, under objection, the failure of the plaintiffs to deliver coke under the second contract, and the purchase by the defendants of coke in the market at an advanced price, whereby they suffered damages largely exceeding in amount the plaintiff's claim, for which they asked a verdict and certificate in their favor against the plaintiffs.

The plaintiffs presented, *inter alia*, the following point : —

A notice of an intended breach of contract will operate as a breach only if accepted and acted upon by the other party, who may, if he pleases, disregard the notice and insist upon performance according to the contract, and if he does so insist upon performance, he cannot afterwards rely on such notice as a breach.

The defendants' letter of Dec. 4, 1879 (Exhibit 12), shows that defendants did insist upon performance by plaintiffs according to the contract. No cause of action therefore accrued to the defendants until after the suit was brought, and the defendants are not entitled to set off the damage in the action for that reason.

Answer : As a whole, this point is refused.

The court charged the jury, in substance, that the defendants were entitled to set off damages sustained by reason of the plaintiff's breach of the second contract, and that the damages were to be measured by the difference between the price at which the plaintiffs agreed to deliver the coke and the market price during the period of the contract.

The jury found a verdict for the defendants, and certified a balance in their favor of \$36,150.12, and judgment was entered thereon. The plaintiff thereupon took this writ of error, assigning for error the refusal of the above point.

J. S. Cooke (*I. P. Hays*, with him), for the plaintiffs in error.

Welty McCullough, for the defendant in error.

MR. JUSTICE PAXSON delivered the opinion of the court, Nov. 7, 1881.

This action was commenced in the court below on the 29th day of November, 1879, and was to recover about \$1,500 for coke delivered by the plaintiffs to the defendants during the previous October. There

was no serious dispute as to either the delivery of the coke or the amount; but the defendants set up as a defence the breach of a contract on the part of the plaintiffs for future deliveries of coke. To state said contract briefly, the plaintiffs had agreed to sell and deliver to the defendants the entire product of their Eldorado works, comprising forty ovens, at a fixed price per ton, and also the product of all other ovens built by them during the continuance of the contract. This contract plainly appears by the correspondence between the parties, and was finally closed on Nov. 11, 1879. On the 19th of the same month the plaintiffs notified the defendants in writing that they would not deliver the coke. On the 4th of December, four days after the delivery was to have commenced under the contract, the defendants wrote to the plaintiffs as follows: "We beg to draw your attention to contract between us by which you agree to furnish us the product of the Eldorado Coke Works (forty ovens); also product of ovens that may be built during the continuance of the contract from Dec. 1. 1879, to May 31, 1880, inclusive, and to advise you that we have been and are now prepared to receive the said coke under said contract. If shipments on our account are not at once commenced, we will go into the market and buy an equal amount of coke which you fail to deliver us, and will hold you responsible for any difference in price which we may have to pay, and will retain the balance which we now have in our hands to secure us against any loss or damage which we may sustain from your failure to comply with contract."

The defendants upon the trial below were allowed to set off their damages by reason of the breach of the above contract, and the jury found a verdict in their favor for \$36,150. (The single specification of error raises the question whether there was any breach at the time the suit was commenced.)

(A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiffs' notice of breach contained in their letter of November 19 and acted upon it, there would plainly have been a breach of the contract.) The plaintiffs in such case could not have relieved themselves by commencing to deliver the coke on December 1, but must have been held to all the legal consequences of the breach. The defendants, however, on December 4, still insist upon compliance. They say "they are now prepared to receive said coke under said contract." This certainly kept the contract alive as to both parties. (The plaintiffs could have gone on and delivered the coke on December 4, in which case there would have been no breach and no damages. The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due, but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance. Ripley v. McClure,

4 Ex. 845; Leake on the Law of Contracts, 878. [The promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance.] But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. Leake on Contracts, *supra*.

It follows from the foregoing principles that on November 29 when the action was commenced below, there was no breach of the contract which the defendants could set up as a set-off to the plaintiffs' claim. Nor does it help the defendants that when the cause was tried the breach was complete. The date of the commencement of the suit is the obvious test in such cases. *Morrison v. Moreland*, 15 S. & R. 61; *Carpenter v. Butterfield*, 3 Johns. Cases, 144.

There was error in not affirming the plaintiffs' eighth point.

*Judgment reversed and a venire facias de novo awarded.*¹

¹ "The learned counsel for the plaintiff does not insist that the contract must necessarily be construed to authorize the plaintiff to continue his work until completion, in the spring and summer of 1878, irrespective of the consequences to the defendant, but that the question of the construction of the contract upon that point was wholly immaterial in determining the issues between the parties. He insists that the defendant, by his notice of March 30, 1878, put an end to the contract absolutely, without any reference to the time when the work should or might be done under the contract; that he did not forbid the plaintiff from going on and completing the work at that time but forbade his doing it at any time, either presently or at any future time; and that the defendant did not claim to stop the plaintiff in his work because he was doing it at an unseasonable time, and thereby unnecessarily damaging him in the enjoyment of his farm.

"There is great force in the argument, and if the defendant did forbid the plaintiff without cause to continue the work at that time or at any other time, and there was no withdrawal on his part from that position, it would be quite immaterial what the construction of the contract should be as to when the work could be lawfully done by the plaintiff. Looking alone at the written notice to quit, given by the defendant, bearing date March 30, 1878, the refusal of the defendant to permit the plaintiff to do any further work under the contract would be absolute; but there is evidence showing that the plaintiff did work after the notice to quit was given, with the consent of the defendant. The plaintiff admits this in his evidence, but he says that the defendant told him to quit when he had completed pulling certain stumps which had been theretofore marked for pulling by the plaintiff. It also appears that the defendant offered to show that after the written notice was given, and whilst plaintiff was still at work, he told him he did not intend to terminate the contract, but to stop his work until after he got his crops off, and that he could then go on and pull the remainder of the stumps, and that the plaintiff assented to that arrangement.

"The evidence offered on the part of the defendant we think should have been admitted, under the pleadings, as tending to show that, notwithstanding the written notice to quit was absolute and unqualified, still the plaintiff was informed before he quit work, and before he had suffered any injury from such notice, that it was not intended as an absolute refusal on the part of the defendant to prevent the plaintiff from performing the contract, and that he was at liberty to perform the same at a proper

ROBERT RAYBURN AND FRED W. RAYBURN v. ANDREW W. COMSTOCK ET AL.

MICHIGAN SUPREME COURT, APRIL 22, 23 — MAY 2, 1890.

[Reported in 80 Michigan, 448.]

ERROR to Alpena. Simpson, J., presiding. Argued April 22 and 23, 1890. Decided May 2, 1890.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Turnbull & Dafoe, for appellants.

Depeuw & Rutherford and *George H. Sleator*, for plaintiffs.

MORSE, J. The plaintiffs entered into a contract with defendants, Nov. 13, 1885, in which they agreed to go upon certain lands of defendants, and cut, haul, and deliver at the west branch of Hubbard Lake, upon what is known as the "Lockwood Landing," all the timber suitable for saw-logs, for the sum of \$3 per 1,000 feet. (From two to three millions of said timber was to be delivered each year until all was delivered.) The timber was to be cut clean, and in a prudent manner, and all to be cut that was suitable for lumber or shingles. Said logs were to be well landed and on skids, and well rolled up. Supplies were to be furnished out of the store of defendants, and money provided to pay the men employed by plaintiffs, April 1, 1886, and the balance, if any, to be paid June 1, 1886, for the logs out and delivered the first winter. The timber put in the second year was to be paid for April 1 and June 1 of 1887, as above.

The plaintiffs went onto the job in the fall of 1885, and that winter cut and delivered about two million feet, and were paid for it according

and seasonable time. This evidence was, it seems, ruled out because it was supposed not to be admissible under the pleadings. We think it was clearly admissible under the pleadings. The plaintiff alleges that the defendant had forbidden him absolutely, and without assigning any cause, from doing any further work under the contract, and sets out in his complaint the written notice of the defendant of March 30, 1878. The defendant, in his answer, does not deny that he gave the written notice as alleged in the complaint, but alleges 'that the plaintiff insisted upon going on and pulling the stumps at the time when the land was ordinarily used for sowing grain and for pasture, and during the season when the same was required for pasturing purposes and for sowing and raising grain thereon, contrary to the express agreement of the parties; and that, because plaintiff so insisted upon going on with the work, he forbade him, because the land was needed for the ordinary purposes of farming.' Under this state of the pleadings, we do not think the defendant was estopped from showing that he notified the plaintiff, after the giving of the written notice, of the reason why he gave the same, and that he did not mean by such notice to absolutely refuse to permit him to do the work at a proper season. Such explanation of the written notice, being given before the plaintiff had acted upon it and quit work, and before he had sustained any damage from such notice, was a withdrawal of the absolute notice to terminate the contract contained in the written notice; and thereafter the plaintiff would not be justified in abandoning the contract, relying upon such written notice as his justification therefor." *Nilson v. Morse*, 52 Wis. 240, 250. See also *Perkins v. Frazier*, 107 La. 390. Compare *Ault v. Dustin*, 100 Tenn. 366.

to contract. (The plaintiffs claim that they faithfully performed their contract for the first year, and were always ready and willing to perform the whole contract, but that they were prevented from doing so by the defendants.) They bring this suit, alleging a breach of the contract on the part of the defendants, and claiming damages for such breach. They also count upon an agreement with defendants in relation to picking up and gathering about 2,500,000 feet of saw-logs scattered around the shores of Hubbard Lake, and putting them in booms ready to be towed across said lake. They allege that defendants agreed to pay them ten cents per 1,000 feet for such picking up; that they have completed the work, and have not been paid. The declaration also contains a claim for \$5,000, based upon the common counts in assumpsit. The plea is the general issue, with notice of recoupment.

Upon the first contract the testimony upon the part of the plaintiffs tended to show that the first year they performed their contract substantially, and that defendants settled up with them, finding no fault at any time with the manner of their performance) that when they were ready to commence again, in the fall of 1886, and went to defendants for supplies, they were informed by one of the defendants, Andrew W. Comstock, that they could not cut another stick of timber upon the lands, — he calling up a clerk to witness that he forbade their going on with the job. They waited until about Dec. 1, 1886, when they took another job, upon which they lost money. There was left when they quit upon the contract about 4,000,000 feet of timber uncut. The defendants' measure showed 3,900,000. The plaintiffs testified that they could have put this timber in at \$2 per 1,000, or at a profit of \$1 per 1,000.

The defendants claim that plaintiffs did not properly perform their contract in the following respects: Did not bank all the logs upon the "Lockwood Landing;" did not cut the timber clean as they went; did not place all the logs on skids, and left over 3,000 logs in the woods, cut but not hauled, some being on skids and some on the ground; that, by reason of the timber not being cut clean, the fire got in and damaged it, and that the same fire burned up and destroyed a large number of the logs left in the woods, and damaged those that were not destroyed. The defendants denied that they ever refused to let the plaintiffs go on with the job, and testify that, Dec. 24, 1886, they served a written notice upon plaintiffs to proceed at once and complete their contract. The plaintiffs admit receiving this notice, but say that they did not receive it until they had taken the other job, and were, therefore, not in a condition to go on with it. (The plaintiffs recovered a verdict of \$1,560.)

The defendants bring error, and claim, first, that, there being 4,000,000 feet of timber upon the lands after the first year's work, the plaintiffs could not have completed the job in less than two years more, as the contract did not authorize them to put in over 3,000,000 in any

one year; that, as the defendants notified them in December, 1886, to go on with the job, the only damages they could recover would be what they suffered between the time they were forbidden to go on and the date they were notified to proceed; and that, under the most favorable view, they could only get damages for the expenses of one year's delay and the interest upon the profits of one year's work.

We think the court charged the jury correctly in this respect. He said, in substance, that when plaintiffs were notified to proceed with the contract, as no suit had been commenced at that time, it was their duty to go on with the contract; if they were in a situation to do so, and that, if the jury believed the testimony of the defendants, the plaintiffs were never prevented from going on with the job, they could not recover, in any event. This question was in dispute, and the jury evidently found with the plaintiffs.)

The testimony shows that plaintiffs, when this notice was served, had taken another contract, which employed all their teams and means. Under their theory, that up to this time defendants had forbidden their going on with the contract, it was too late for this notice to have any effect, whatever upon the rights of the parties. Certainly the defendants could not refuse to furnish supplies, and forbid plaintiffs cutting any timber on the land, and wait until plaintiffs had taken another job, and then withdraw their refusal to permit plaintiffs to finish the contract, and, by a notice to them to go on and perform, force plaintiffs to proceed, or lose all claim for damages thereafter. The plaintiffs had a right to take the refusal as it was given, and to seek other employment upon the strength of it, and they were not obliged to break the other contract they had made in order to save their rights under this one with the defendants. In view of the fact that the defendants went on the premises themselves in the winter of 1886 and 1887, and took off 500,000 feet, and let the contract to take off the balance to one Mulvaney, in 1887, at \$2.50 per 1,000 feet, we are satisfied that if it be true, as claimed by plaintiffs, that defendants refused to let them go on with the contract until they had taken another job for the winter of 1886 and 1887, plaintiffs were fully justified in treating the contract as broken by the defendants, and were authorized to recover damages for the breach of the same as if no notice to proceed had ever been served upon them.)

The claim that the contract had not been fully performed by the plaintiffs the first year was, under the testimony, fairly submitted to the jury. There was a dispute as to the lines of what was known as the "Lockwood Landing." The plaintiffs' testimony showed that a few thousand feet were piled beyond what Comstock claimed to be the line of the landing, the plaintiffs supposing the line extended further up the creek. After Comstock pointed out the line, no more logs were banked above it. If the jury believed this, there was a substantial compliance with the contract in this respect.

Plaintiffs' testimony also showed the timber cut clean, and in a pro-

dent manner. They admitted that a few logs were left in the woods, some of which were not skidded; but this was owing to the fact that the season broke up with a big rain-storm, which, with the piling of logs by defendants upon a pond that plaintiffs' road crossed, prevented their getting all the logs out. Plaintiffs' testimony showed that this piling of logs by the defendants upon this pond, along the sides of their road across it, not only prevented plaintiffs' getting out all the logs they cut, but also from cutting and hauling more. This was denied by defendants; but, if so found by the jury, it was a sufficient excuse for not banking all the logs cut.

The evidence upon all the points in which a non-performance of the contract was averred by defendants, coupled with the testimony of plaintiffs that defendants settled with and paid them for the first year's work without finding any fault whatever, and that they never complained of the contract being broken in any way by plaintiffs until they refused to permit further performance by plaintiffs in September, 1886, was sufficient to go to the jury, and was properly submitted to them. They found against the defendants, and we are not prepared to say they were not warranted in so finding.

The true rule of damages was also laid down by the court. The plaintiffs testified that it cost them \$2.10 per 1,000 to put in what they delivered the first year, and that, as part of the work, such as getting camps and roads in order, was done the first year, so as to cheapen the work on the job thereafter, they could have put the balance in for \$2 per 1,000. They were therefore entitled, under their testimony, to \$1 per 1,000 profit. They did not get 50 cents per 1,000, however, by the verdict; the jury, evidently taking into consideration the evidence upon the part of defendants, some of which tended to show that there would have been no profit. There is no reason shown in the record why the plaintiffs should not recover, upon a proper showing, the difference between the contract price and the cost of putting in the logs. There is no particular element of uncertainty regarding the profits the plaintiffs would have realized from the performance of the contract. See *Goodrich v. Hubbard*, 51 Mich. 70; *Burrell v. Salt Co.*, 14 id. 34; *Loud v. Campbell*, 26 id. 239; *Leonard v. Beaudry*, 68 id. 312, 80 id. 163.

But the court committed error in relation to the picking up of the logs in Hubbard Lake. Both parties admitted that there was a contract in relation to this work, but differed as to the compensation to be paid therefor. The plaintiffs claim they were to have 10 cents extra per 1,000; and the defendants testify that they were to pay only 2 cents extra above the 25 cents for towing, and that they had settled with plaintiffs, and paid them in full upon that basis. Yet the circuit judge permitted evidence to be given that it was worth 50 cents per 1,000 to pick them up, and instructed the jury as follows:—

“The second element in this case is the question in regard to picking up these logs on Hubbard Lake. The plaintiffs claim that defend-

ants agreed to give them 10 cents a thousand feet extra, over and above the 25 cents that they were to receive for towing. If there was a contract between the defendants and plaintiffs in this case, and they understood it, that the Rayburns were to receive 10 cents a thousand for picking up those logs, they were entitled to it, if there was such a contract, and it was understood by all the parties. (There could not be any contract unless they did understand each other.) But the defendants claim that the contract was different. The defendants claim that the plaintiffs agreed to pick them up for two cents extra. If that was the contract, and the parties understood it, then they were bound by that, because when they make their contracts they are bound by them. It does not make any difference how hard it is for one side or good for the other, when we enter into contracts; if we do enter into them, we are bound by them. So that here are two separate claims as to the contract, — one for two cents, and one for ten cents. You are to judge. (You have heard the testimony as to whether there was any contract at all, and if so, which of these parties is right. If it was for two cents per thousand feet, then the Rayburns will have to be satisfied with that; and it seems from the evidence that they have received that.) If it was ten cents per thousand feet, then they are entitled to receive it; and, if they have not received it, then they are entitled to receive it at your hands in this suit.) But, if you find that these parties did not agree on anything, or if they did talk about it, they were both mistaken when they quit, and their minds did not meet upon this question, then there was no contract at all, because it takes as many as two parties to make a contract, and their minds must meet. If you should find that there was n't any contract, and the work was done, — and that is admitted, — in that case the Rayburns would be entitled to receive whatever in your judgment the work was reasonably worth; because when we work for a man, and there is no agreement as to what we shall receive, the law gives us what it is worth.)

There was no ground in the evidence from which the jury might infer that there was no contract, — that the minds of the parties did not meet. There was undoubtedly a parol arrangement as to the picking up of these logs; and the only question for the jury to determine was the price to be paid for the work. There was no misunderstanding about it. Either the defendants agreed to pay ten cents or two cents. The burden of proof was upon plaintiffs to show that the price was ten cents. Failing in this, they could not recover, as they had been paid the two cents. As there is no way of ascertaining what conclusion the jury arrived at as to this matter, the judgment must be reversed and a new trial granted, with costs of this court to defendants.

The other justices concurred.

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L. J. KADISH v. A. N. YOUNG.

ILLINOIS SUPREME COURT, NOVEMBER 20, 1883.

[Reported in 108 Illinois, 170.]

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit, brought by A. N. Young and George Bullen, against L. J. Kadish and Charles Fleischman. A trial was had, resulting in a verdict and judgment of \$20,000 damages against the defendants.

Mr. John Woodbridge and Mr. Francis Lackner for the appellant Kadish; Messrs. Hoadley, Johnson & Colson, for the appellant Fleischman.

Mr. William A. Montgomery, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court:

This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention.

The questions of fact contested upon the trial in the circuit court, and to some extent discussed in argument here, are, by the judgment of the Appellate Court, conclusively settled against appellants, and we are denied the power of inquiring whether they are rightly or wrongly settled. *Bridge Co. v. Commissioners of Highways*, 101 Ill. 519; *Edgerton v. Weaver*, 105 id. 43; *Indianapolis and St. Louis R. R. Co. v. Morganstern*, 106 id. 216; *Missouri Furnace Co. v. Abend*, 107 id. 44.

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract. But that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see *McNaught v. Dodson*, 49 Ill. 446, *Larrabee v. Badger*, 45 id. 440, and *Saladin v. Mitchell*, id. 79), and is not contested by appellants' counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. (If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell (where the property is in the possession of the seller at the time), at least within a reasonable time after such breach, will result as a necessary consequence of the breach.) When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. In *Leigh v. Patterson*, 8 Taunt. 540 (4 Eng. C. L. 267), *Phill-*

potts et al. v. Evans, 5 M. & W. 475, *Ripley v. McClure*, 4 Exch. 359, and, it may be, also in other early cases, it was held a party to a contract to be performed in the future cannot, by merely giving notice to the opposite party that he will not perform his part of the contract, create a breach of the contract. Subsequently, however, in *Cort v. Ambergate, Nottingham, &c. Ry. Co.* 17 Q. B. 127, and more explicitly in *Hochster v. De la Tour*, 2 E. & B. 678, the doctrine was announced as not in conflict with previous decisions, that the party to whom notice is given in such cases will be justified in acting upon the notice, provided it is not withdrawn before he acts. Lord Campbell, C. J., in delivering his opinion in the latter case, and speaking for the court, used this language: "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer."

The leading text-writers who treat of this question follow the authority of these cases, and the rule they announce is thus expressed in *Sedgwick on Damages*, (6th ed.) 340, * 284: "An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance by giving notice that he would not be ready to complete the agreement, and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement, and have adhered to the day of the breach as the period for estimating damages." To like effect see *Chitty on Contracts*, (11th Am. ed.) 1079; 2 *Parsons on Contracts*, (6th ed.) 676; *Benjamin on Sales*, (1st ed.) 559, (4th Am. ed.) 973; *Addison on Contracts*, * 952; *Wood's Mayne on Damages*, 250, * 150.

The question came before this court in *Fox v. Kitton*, 19 Ill. 519, whether, when a party agrees to do an act at a future day, and before the day arrives he declares he will not keep his contract or do the act, the other party may act on such declaration, and bring an action before the day arrives; and it was held, on the authority of *Phillpotts v. Evans*, and *Hochster v. De la Tour*, *supra*, that he may; and in that case it is said, in the opinion of the court, that there is no conflict in the cases referred to by counsel in the discussion thereof, and to prove it, this language from the opinion of Parke, Baron, in *Phillpotts v. Evans*, is quoted: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." And it is then added: "This is in strict accordance with the principles recognized in the leading case relied on by the plaintiff, — *Hochster v. De la Tour*."

In *McPherson v. Walker*, 40 Ill. 371, the question before the court was, whether it was error to say in an instruction that where there is a contract for the sale of property to be delivered in the future, a tender or offer of the property by the seller on the day of delivery is excused by a previous notice of the buyer that he would not accept the property, and it was held that it was. In the opinion of the court it is said: "The rule is, if one bound to perform a future act, before the time for doing it declares his intention not to do it, this, of itself, is no breach of his contract; but if this declaration be not withdrawn, when the time arrives for the act to be done it constitutes a sufficient excuse for the default of the other party," — referring to 2 Parsons on Contracts, 188, *Hochster v. De la Tour*, *supra*, and *Crist v. Armour*, 34 Barb. 378.

In *Chamber of Commerce v. Sollitt*, 43 Ill. 519, the character of question is the same as in the two preceding cases to which we have just referred, and it was decided the same way. *Cort v. Ambergate Ry. Co.*, *supra*, *Hochster v. De la Tour*, *supra*, and *Fox v. Kitton*, *supra*, are referred to as sustaining the decision.

In *Cummings v. Tilton*, 44 Ill. 173, one of the points decided was, if the party who is to receive informs the party who is to deliver that he cannot pay the money, the latter is excused from offering to deliver, — but there is no discussion of the question.

Follansbee v. Adams, 86 Ill. 13, involved the same question as that decided in *Fox v. Kitton*, *supra*, and on the authority of that case, and *Chamber of Commerce v. Sollitt*, *supra*, it was decided the same way.

While it is true that in none of these cases was the question whether one party to a contract may, by only a notice of his intention not to comply with its terms, create a breach of the contract, before the court, still, in all of them it is assumed that he cannot; for if he could, the questions they decide would have been immaterial, and the English cases which they profess to follow, as has been seen, expressly hold that he cannot.

But counsel insist this court has held the contrary in *Gale v. Dean*, 20 Ill. 320, and in *Trustees v. Shaffer*, 63 id. 244. This is a misapprehension. Neither case professes to discuss the question before us, and no notice is taken in either of the decisions or dicta to which we have above referred. In *Gale v. Dean* no time was fixed by the terms of the contract for its performance, and in view of this omission the court held it reasonable that after the lapse of a reasonable time either party might declare a breach of the contract, if not performed; and it was in reference to this omission and these reciprocal rights of the parties under the contract, solely, that the court used the language quoted and relied upon by counsel for appellants, namely, that "we do not think that Gale, when he found he could not perform, was absolutely at the mercy of Dean for the determination of the time when his liability should be fixed and the measure of that liability determined." It had not the slightest reference to the character of question now

before us. In the other case (*Trustees v. Shaffer*), the time for the performance of the contract had arrived. There was no question in that respect. If the plaintiff was improperly discharged, there was a clear breach of the contract. There was no controversy in regard to the question whether one party to a contract to be performed in the future, can, by a mere notice in advance of the time of performance that he does not intend to perform, create a breach of the contract; nor was there any question as to what acts a party may be required to do in advance of a breach of contract to mitigate the damages of the adverse party, because of notice that there would be a breach by him.

After breach of a contract, as before herein intimated, we do not, at present, question that it is the duty of the party entitled to damages to do what he reasonably may, without prejudice to his rights, to lighten the burden falling on his adversary.

There is nothing in the more recent English cases, as we understand them, repugnant to those to which we have referred upon this question.

In *Frost v. Knight*, L. R. 7 Exch. 111 (1 Moak, 218), decided in the Exchequer Chamber in February, 1872, the suit was for breach of a marriage contract, whereby the defendant had promised to marry the plaintiff upon the death of his father, but the father still living, the defendant had announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. Cockburn, C. J., in delivering the opinion of the court, thus states the law, after referring to the previous decisions: "The promisee, if he pleases, may treat the notice of intention" (i. e. not to perform the contract) "as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the proper time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." This was followed, and its doctrine reiterated, in *Brown v. Miller*, L. R. 7 Exch. 319 (3 Moak, 429), decided in the Court of Exchequer in June, 1872, and *Roper v. Johnson*, L. R. 8 C. P. 167 (4 Moak, 397), decided in the Common Pleas in February, 1873.

Counsel for appellants refer to the fact that Keating, J., in *Roper v. Johnson*, says: "If there had been any fall in the market, or any other circumstances calculated to diminish the loss, it would be for

defendant to show it," — and then cites with approval from the opinion of Cockburn, C. J., in *Frost v. Knight*, *supra*, to the effect that "the damages are subject to abatement in respect of any circumstances which would entitle him to a mitigation," etc., and insist they recognize the duty, here, of appellees, upon receiving notice, etc., to have sold upon the market or have entered into another contract for January delivery, etc. It is enough to observe, in answer to this, that in both *Frost v. Knight* and *Roper v. Johnson*, *supra*, the notice that defendant would not comply with the contract was accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declarations of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose; for, as we have seen, the theory in such case, as laid down by Cockburn, C. J., in *Frost v. Knight*, *supra*, is: "He keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to *Dillon v. Anderson*, 43 N. Y. 231, *Danforth et al. v. Walker*, 37 Vt. 240 (and same case again in 40 Vt. 357), and *Collins v. Delaporte*, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not

go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In *Dillon v. Anderson*, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In *Danforth et al. v. Walker*, 37 and 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car-loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them, and as soon as he could get them away, some time during the winter. Soon after the first car-load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 *Sutherland on Damages*, 361.

The points in issue in *Collins v. Delaporte* are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of *Danforth et al. v. Walker*, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it, as it was said in *Frost v. Knight*, *supra*, the defendant was, in case of notice, not to perform a contract the time of the performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind, — in those there was. That it was not intended, by these cases, to trench upon the doctrine of *Leigh v. Patterson*, *Phillipotts v. Evans*, and other cases of like character, is

manifest from the fact that they make no reference to those cases, or to the rule they announce; and in *Collins v. Delaporte*, no reference is made to *Daniels v. Newton*, reported in the next preceding volume (114 Mass. 530), wherein that court refused to follow the modification made in *Hochster v. De la Tour*, and *Frost v. Knight*, of the rule recognized by the preceding English decisions, but held that an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal, on the defendant's part, ever to purchase. It follows that, in our opinion, the ruling on the point in question was free of substantial objection.

Objection is urged because the circuit judge gave an instruction, at the instance of appellees, with reference to the obligations and duties of the parties under the alleged contract of sale, in which no mention is made of a custom affecting those obligations and duties, of which custom proof was introduced on the trial. The existence of this custom was not conceded. Appellants claimed its existence, and appellees denied it. There was evidence both ways. This instruction presented the law correctly upon appellees' theory of the case, and the seventh instruction, given at the instance of appellants, presented the law, — including the hypothesis of a custom being proved, — upon the theory of the case. There is no repugnance between them. Each simply presents a different theory of the case, having evidence tending to sustain it, — and in this there is no error. *City of Chicago v. Schmidt*, Admx. 107 Ill. 186; *Illinois Central R. R. Co. v. Swearingen*, 47 id. 206.

There was proof, upon the trial, tending to show that although appellees owned and had in their possession, at the time of the making of the alleged contract, an amount and kind of barley equal to or greater than that professed thereby to be sold, yet that they then only had of the warehouse receipts, which they actually tendered to appellants in January, those for 48,500 bushels, and that they subsequently obtained from Huck & Lefens the warehouse receipts for the remaining 51,500 bushels, upon a contract, whereby appellees agreed to pay Huck & Lefens therefor, at all events, one dollar per bushel, and one dollar and twenty cents per bushel if appellees shall recover from appellants in this suit. The court, in giving and refusing instructions, ruled that this in no wise concerned appellants, — that if the facts were as claimed, it did not make Huck & Lefens necessary parties to the suit, nor entitle appellants to any reduction in the measure of damages. In this there was surely no error. Huck & Lefens have no privity of contract with appellants, and whether appellees pay much or little for the barley with which to comply with their contract, cannot concern appellants. It was sufficient they owned and tendered the barley at the appointed time. If it had been given them, their measure of damages must be precisely the same as it would be had they paid ten-fold more than it was worth. The only effect of the transactions by which

they obtained the barley is to vest title in them, and when it was thus vested it was absolutely theirs to do with as they pleased. No court, so far as our researches have enabled us to know, ever held that the price paid by the seller for an article sold and contracted to be delivered in the future, was a circumstance to be taken into consideration by the jury in determining the amount of damages the seller is entitled to recover upon the buyer's refusing to receive and pay for the property, and the distinguished counsel representing appellants have been unable to refer us to any such decision.

Objection is also taken to the language of the instruction with reference to the joint liability of appellants. The language of the instruction is objectionable, but, in our opinion, it is not possible that it could have misled the jury. The question was put in issue whether appellants were partners in the transaction, by proper pleadings. Evidence was introduced by each party on that question. There was not a particle of evidence tending to show that appellants were jointly interested in the transaction, if interested at all, otherwise than as partners. If the evidence in behalf of appellees prevailed, appellants were partners in the transaction; if that in behalf of appellants prevailed, they were not.

Upon the whole, we perceive no error of law in the rulings below. The judgment is therefore affirmed. *Judgment affirmed.*

TRAVER v. HALSTED.

NEW YORK SUPREME COURT OF JUDICATURE, JANUARY, 1840.

[Reported in 23 Wendell, 66.]

QUESTION on sale of real estate. On the twenty-fifth day of December, 1837, an agreement under seal was entered into between the parties, whereby it was stipulated on the part of Halsted to sell to Traver a farm containing about 163 acres of land, to be conveyed as described in his deed without survey, at the rate of \$70 per acre, and that on or before the fifth of April then next, on receiving from Traver the price of \$70 per acre, that he would, at his own costs and expense, execute a proper conveyance for the conveying and assuring the fee simple of the premises to Traver, free from all incumbrances, except a mortgage, executed by him to Seth Lawton for securing the payment of \$5000 — the conveyance to contain a general warranty and the usual full covenants. On the part of Traver, it was stipulated, that on or before the fifth day of April ensuing the date of the agreement, on the execution of such conveyance by Halsted, to pay the sum of \$70 per acre for the farm, in manner following: that he would assume and pay the mortgage of \$5000 when due, and secure the balance to be paid in

cash on or before the first day of May ensuing the date of the agreement. The parties bound themselves each to the other for the performance of their respective stipulations, in the penalty of \$1500, which were declared liquidated damages. In May, 1838, Traver brought an action of covenant against Halsted, claiming the recovery of the \$1500 stipulated damages. After setting forth the agreement in his declaration, the plaintiff averred that on the 5th April, 1838, he tendered to the defendant an agreement in writing under his hand and seal, whereby he assumed to pay, when due, the mortgage to Lawton, and covenanted to pay the moneys thereby secured, and to indemnify the defendant from the payment thereof; and on the same day tendered to the defendant a bond in the penal sum of \$14,000, executed by the plaintiff and two other persons as sureties, conditioned to pay on the first day of May then next the balance of what should be due to the defendant, according to the terms of the agreement of 25th December, 1837; and that the sureties were severally worth \$7000, over and above all debts owing by them. He also averred that the defendant did not and would not execute the conveyance on the said fifth day of April, according to the terms of the agreement; and on the contrary thereof, that he had no title whatever to the premises, and wholly neglected and refused to execute any conveyance whatever to the plaintiff conveying and assuring to him the fee simple, &c.

The defendant interposed several pleas in bar. In the third plea, he alleged that the plaintiff did not, on or before the 5th April, 1838, nor at any other time pay, or tender, or offer to pay, the sum of \$70 per acre, for the farm, &c. Fourth plea, that the plaintiff did not on, &c., nor at any other time assume and pay, or offer, or tender to assume and pay, or pay, or tender to assume and pay, when due, the said mortgage (the mortgage to Lawton). Fifth plea, that the plaintiff did not on, &c., nor at any other time secure, nor offer or tender to secure, the balance of the purchase money for the farm, over and above the mortgage, &c. Sixth plea, that on the 5th April, 1838, he, the defendant, duly executed and tendered a deed of conveyance of the premises to the plaintiff, setting forth *in hæc verba*, a conveyance of the premises, with full covenants, embracing among others the covenant of warranty.

In the eighth plea, the defendant alleged in bar of a recovery, that before 5th April, 1838, to wit, on the fourth day of said April, said plaintiff wholly refused to accept any deed of conveyance of said premises on the said fifth day of April, under and in pursuance of said articles of agreement, and to perform and keep the covenants and agreements in said articles of agreement on his part to be kept and performed, at the times and in the manner prescribed in said articles of agreement," without this, &c. (traversing the refusal to execute the conveyance).

The plaintiff, after enrolling the articles of agreement declared upon, demurred separately to the pleas above enumerated, assigning various special causes of demurrer, and amongst others that the three first

pleas were bad, inasmuch as they each concluded with a verification, and that the last plea was bad in not alleging to whom the refusal to accept a conveyance was communicated.

H. Swift, for the plaintiff.

S. Barculo, for the defendant.

By the Court, COWEN, J. The first three of the pleas demurred to are clearly bad, as not being a direct answer to either of the plaintiff's averments, that he tendered the requisite assumption, and security. The tender of these was fully and directly averred; they presented the material and issuable facts upon which the plaintiff relied as entitling him to recover, and the only facts to which it is pretended the pleas can be applied. The course of the defendant was briefly and directly to deny the tender in manner and form as the plaintiff had alleged and set it forth; instead of which, he either denies payment, &c., generally, as in the third plea, or tender pursuant to the intent, &c., as in the fourth and fifth; concluding in all three with a verification. Had the tenders averred in the declaration been well answered, several complete issues would have been formed, which should have been followed with a conclusion to the country.

The sixth and eighth pleas demand somewhat more consideration. The sixth raises the question whether the defendant's covenant calls for anything more than a conveyance in a certain form, without title; or whether it was necessary to show, especially as the plaintiff had denied the fact in his declaration, that he had a fee to convey. The eighth plea supposes that a refusal by the plaintiff on the fourth, discharged the defendant from all obligation to convey on the fifth day of April.

1. The sixth plea admits, that when the plaintiff came and offered to perform, tendering the requisite securities for the purchase money, the defendant had no title to convey; and insists that the tender of a deed corresponding with the covenant in point of form was sufficient. (The covenant is "to execute a proper conveyance for conveying and assuring the fee simple," &c.) There is then a distinct provision that the conveyance shall contain full covenants. To my mind a proper conveyance for conveying and assuring the fee simple, could not be executed by the grantor, unless he held the title. Otherwise it would be but a conveyance proper for conveying and assuring no title at all. The tender was, therefore, clearly bad, as coming short of the express intent of the parties. The covenant was more than a stipulation to execute a deed of a certain description or form, to contain such and such covenants. The cases cited by the defendant's counsel, therefore, do not apply. *Carpenter v. Bailey*, 17 Wendell, 244.

2. As to the refusal of the plaintiff on the 4th, to receive a conveyance on the day appointed by the contract, or, as we will read it for the present, notice to the defendant that it would not be received, I agree that this might have operated as an excuse for the defendant not being ready, and perhaps would have wholly discharged him, had the matter stopped here. *Jones v. Barkley*, 2 Doug. 684, 694, *per* Ld. MANSFIELD, CH. J., and BULLER, J. But the refusal on the 4th was not

objection made

conclusive on the plaintiff. He had a right to change his mind, as he avers that he did, which is not denied by the plea, and still present himself and offer to perform on the fifth. This was equivalent to a revocation of what he had before said, which could not operate as more than a mere license or excuse to the defendant for not being ready. The refusal did not discharge the covenant; but we would not allow the plaintiff thus to play a trick on the defendant. *Franchot v. Leach*, 5 Cowen, 506, 508. He does not, however, say he had been thrown off his guard, and that he merely wanted time, therefore. He admits, by not denying, what the plaintiff avers in his declaration, that when he did come, and tender a performance, the defendant met him with a general refusal; and would not even receive the securities. *Non constat* that he had parted with the title, or taken any other steps in consequence of the notice of the day before, so as to be prejudiced by it. If he had, then the plaintiff ought to be estopped from insisting on performance. But he recanted his refusal within the time fixed by the covenant, and the defendant still continued, for aught we hear, on the 5th and up to the time of the recantation, in all respects as able to perform as he would have been had the plaintiff said nothing.

There is certainly another objection to this plea, the main one urged on the argument, which seems to me quite difficult to overcome. It is not averred that the plaintiff's refusal was addressed to the defendant. Now it might have been a refusal answering to the word in the plea, had it been addressed to a neighbor no way connected with the defendant, and of which he never heard. The utmost the allegation can mean is, that the plaintiff declared on the fourth, that he would not accept a deed on the fifth. The word refuse is a very unhappy one to use for the fourth. How could the plaintiff refuse, in the proper sense of the word, on that day, what the defendant had no right to solicit, or to offer, or to expect, until the next day. The plea, therefore, can mean nothing more than a declaration that the plaintiff would not perform when the time came. This might, in its own nature, as well be addressed to a stranger as to the defendant.

The pleas demurred to are, we think, all bad; and the judgment must be for the plaintiff, with leave, &c.

Substantive Contract.

BORROWMAN, PHILLIPS & CO. v. FREE & HOLLIS.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, NOVEMBER 25, 1873.

[Reported in 4 Queen's Bench Division, 500.]

ACTION for damages for not accepting and paying for a cargo of maize.

The plaintiffs sued upon a contract the benefit of which, with all rights under it, had been assigned to them; the following were the material portions:—

London, May 7th, 1877.

"Sold to Messrs. Free & Hollis a cargo of mixed American maize . . . say three to four thousand quarters of 480 lbs., as per bill of lading, to be dated between the 15th of May and 30th of June, inclusive, at the price of thirty shillings and sixpence per 480 lbs. Payment by cash in London in exchange for shipping documents . . . or by the buyer's acceptances at sixty days' sight from date of arrival of bill of lading in London, with shipping documents attached, as usual. Sellers to render invoice within seven days of arrival of bill of lading in England."

The contract contained a clause providing that any dispute should be referred to arbitration.

At the trial before DENMAN, J., it was proved that the plaintiffs offered to the defendants a cargo to arrive by a vessel called the *Charles Platt*, and stated that they had not then received the shipping documents. The defendants refused to take this cargo, on the ground that the shipping documents had not arrived; the plaintiffs, however, persisted in their offer. Under the provision in the contract this dispute was referred to arbitration, and the arbitrator decided that the defendants were not bound to accept the cargo of the *Charles Platt* in performance of the contract. The plaintiffs afterwards, on the 9th of July, offered the cargo of a vessel called the *Maria D.*, stating in their letter, "bill of lading to hand to-day, and dated about the 24th of June," and asking the defendants which of the modes of payment provided in the contract they preferred. The defendants refused to accept the cargo of the *Maria D.*, on the ground that they were not bound to accept any cargo in substitution for that of the *Charles Platt*, the offer of which the arbitrator had decided to be invalid. The plaintiffs did not, in point of fact, receive the shipping documents of the *Maria D.* until the 4th of August, and there was some evidence that on the 9th of July her cargo did not belong to them. The plaintiffs having sustained a loss upon the sale of the cargo, sued the defendants to indemnify themselves against it.

The defendants contended that there had been no valid tender of the cargo of the *Maria D.*, inasmuch as the shipping documents were not tendered at the same time. The plaintiffs alleged that the tender had been waived. DENMAN, J., found for the plaintiffs upon the question of waiver; but he gave judgment for the defendants on the ground that the plaintiffs had appropriated the cargo of the *Charles Platt* in satisfaction of the contract, and that after the arbitrator had decided that the defendants were not bound to accept it, the plaintiffs could not lawfully tender the cargo of any other vessel.

The plaintiffs appealed.

November 23, 25. *Herschell, Q. C.*, and *A. L. Smith*, for the plaintiffs.

Benjamin, Q. C., *Philbrick, Q. C.*, and *Reginald Brown*, for the defendants.

The arguments are sufficiently noticed in the judgments.

*Brown v. Royal Insurance Co.*¹ was cited as to the effect of an election made in pursuance of a contract.

BRAMWELL, L. J.² I think that this judgment cannot be supported. I will deal first with the second point, which has been made before us on behalf of the defendants, namely, that the plaintiffs were not in a condition to tender the cargo of the *Maria D.*, because it did not then belong to them. I think that this point was not taken at the trial, and if it had been the plaintiffs would have been able to meet it. I think that that is clear upon the construction of the documents and upon the facts before the Court. (All that the sellers were bound to do under the contract of sale was to name the ship and to send on the invoice within the proper time.) (This they did, and the buyers were then to declare their option as to the mode of payment.) It was contended at the trial that the tender was insufficient, because it was not accompanied with the shipping documents of the *Maria D.* (I think it clear that it was unnecessary that at the time of the tender the sellers should have them in their possession. The performance of the contract does not depend upon that circumstance. As I have already said, before us the contention has been urged that the cargo of the *Maria D.* was not the plaintiffs'. Now, I quite allow that although a contention is not formally made at the trial, yet if it is obvious upon the face of the evidence it may be urged before us when the case is considered in all its aspects. This objection, however, is of a doubtful nature. Moreover, the plaintiffs might have met it by evidence that they had previously bought it; but, even if they had not bought it, the objection seems to me unsustainable; it is quite competent for a man to sell what does not belong to him: before the time for performance he may have bought it or procured the assignment of it, and be ready to fulfil his contract. The contention for the defendants is not maintainable either in the shape taken at the trial or in the form urged before us.

As to the main point in the case I cannot agree with the view of DENMAN, J. In due course after the contract had been entered into the *Charles Platt* arrived, but the shipping documents had not reached the plaintiffs when they offered her cargo to the defendants. The latter objected that under the contract they were not bound to take it without the shipping documents. This objection was not allowed by the plaintiffs, and the question was referred to arbitration. The arbitrator was of opinion that the plaintiffs could not insist upon the tender. It is unnecessary to express any opinion as to the decision of the arbitrator. The plaintiffs then offered a second ship, the *Maria D.*, within the time limited by the contract. (It has been argued that by the tender of the *Charles Platt* the option of the plaintiffs was determined, and that the position of the parties is the same as if the *Charles Platt* had been named in the contract, and that no other ship could be de-

¹ 1 E. & E. 853; 28 L. J. (Q. B.) 275.

² BRETT, L. J., and COTTON, L. J., delivered concurring opinions.

Offer to tender cargo of *Maria D.* made before the *Charles Platt* arrived, but the shipping documents had not reached the plaintiffs when they offered her cargo to the defendants. The latter objected that under the contract they were not bound to take it without the shipping documents. This objection was not allowed by the plaintiffs, and the question was referred to arbitration. The arbitrator was of opinion that the plaintiffs could not insist upon the tender. It is unnecessary to express any opinion as to the decision of the arbitrator. The plaintiffs then offered a second ship, the *Maria D.*, within the time limited by the contract. (It has been argued that by the tender of the *Charles Platt* the option of the plaintiffs was determined, and that the position of the parties is the same as if the *Charles Platt* had been named in the contract, and that no other ship could be de-

clared. I do not think this argument maintainable. Suppose that a clause had been inserted, that no ship was to be declared whose shipping documents had not then arrived in England. A clause of that kind would be repugnant to the theory that the contract is to be treated as if the *Charles Platt* had been the ship named in it. The case may be shortly stated as follows: if the *Charles Platt* was a proper ship, the plaintiffs were entitled to tender her cargo; if she was not, they were entitled to withdraw the tender, and instead of the cargo of the *Charles Platt* to offer that of the *Maria D*. The defendants have relied upon *Gath v. Lees*,¹ but the decision is distinguishable. In that case cotton was "to be delivered at seller's option in August or September, 1864." The seller elected to exercise that option in August, and notice that it would be so exercised was accepted by the buyers. The seller had a right to exercise that option [but in this case, upon the defendants' hypothesis, the plaintiffs by naming the *Charles Platt*, exercised their option in an improper manner; therefore they had a right to withdraw their tender, and to exercise it in a proper manner. That case shows that this action is maintainable. The judgment of DENMAN, J., must be reversed.²

GRAY v. SMITH ET AL.

CIRCUIT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
AUGUST 10, 1896.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, OCTOBER 4, 1897.

[Reported in 76 *Federal Reporter*, 525, and 83 *Federal Reporter*, 824.]

THIS was an action for damages for breach of contract brought against the executors of Edgar Mills. A jury trial was waived and the Court found the following facts. On September 16, 1891, Edgar Mills made to the plaintiff a written offer to buy a lot on Market Street, San Fran-

¹ 3 H. & C. 558.

² *Ashmore v. Cox*, [1899] 1 Q. B. 436, 440, *acc.* Compare *Kurtz v. Frank*, 76 Ind. 594; *Hallwood Cash Register Co. v. Lufkin*, 179 Mass. 143; *Bell v. Hoffman*, 92 N. C. 273; *Ault v. Dustin*, 100 Tenn. 366.

In *Rose v. Hawley*, 133 N. Y. 315, 320, the court said: "Let us suppose a suit on a contract in which the plaintiff recovers, but on appeal to the General Term the judgment is reversed, because when the suit was brought the debt was not due or could not be enforced without a demand; that the plaintiff doubting the law and faced with a difficulty which he cannot cure on a new trial, appeals to this Court, where the reversal is affirmed and judgment absolute is ordered for the defendant. Is it true that such judgment prevents utterly a future recovery on the contract? May not the plaintiff sue when the debt does mature or make the needed demand, and then maintain his action?"

See further *Van Fleet's Former Adjudication*, §§ 55, 56.

cisco, for \$240,000, \$125,000 payable in cash and the remainder in several specified tracts of land. The offer by its terms was to hold good for three weeks. On October 6, 1891, the plaintiff accepted in writing the offer. The title to the lot on Market Street was at the time and throughout the time covered by the dealings of the parties with each other in Joseph A. Donohoe, Sr. On September 4, 1891, the plaintiff and one J. H. Cavanaugh had agreed with one another to share equally any commission or profit which could be obtained from the sale of this lot. On September 18, Cavanaugh began negotiations to buy the lot and on October 7, Joseph A. Donohoe, Jr., executed as agent for his father a writing by which he agreed to sell to Edgar Mills the lot for \$165,000 and a portion of the taxes, payable on delivery of deed after examination of title, say fifteen days from date. On October 8, Edgar Mills was first informed that the title of the lot was in Donohoe and that the agreement to sell it to him, Mills, had been executed. Mills never accepted the offer of Donohoe, and neither Mills, Cavanaugh, nor the plaintiff, Gray, complied or offered to comply with the terms of the offer. Prior to October 23, Donohoe delivered an abstract of his title to attorneys for Mills. On November 18, the attorneys reported to Mills that the title was fatally defective. Whereupon Mills declined to complete the purchase and notified Donohoe and the plaintiff of his refusal. On November 23, Donohoe executed three several deeds to the lots, one to Mills, one to Cavanaugh, and one to the plaintiff, and made tender of them, demanding \$165,000 at the same time. Each tender was refused. In fact, the title was not defective. Further facts appear in the opinion.¹

Sidney V. Smith and Vincent Neale, for the plaintiff.

S. C. Denson, J. J. De Haven, and Richard Bayne, for the defendants.

McKENNA, C. J. The covenants between Gray and Mills were mutual and dependent, and hence defendants urge that Gray must show not only a willingness to perform, but an ability to perform, as a condition of the recovery of damages, and have cited a number of cases illustrating the principle. The contract of Donohoe was to convey to Mills upon the payment of \$165,000 and the taxes. The contract of Mills, however, was to pay \$125,000 and certain lands. There was then \$45,000, besides the taxes, to be paid by Gray (I omit Cavanaugh's name for convenience), and this money he expected to raise on the country lands conveyed to them by Mills. This makes Gray's ability to perform not independent of Mills' performance, as the principle would seem to require, but dependent on Mills' performance. Concurrent and dependent covenants are defined by Bouvier as follows: "Concurrent covenants are those which are to be performed by the parties to each other at the same time. A dependent covenant is one which it is not the duty of the covenantor to perform until some other

¹ The statement of facts has been abbreviated and only so much of the opinions has been printed as relates to one defence.

covenant contained in the same agreement has been performed by the opposite party. When covenants are dependent or concurrent, the covenantee is not entitled to recover for the breach of such a covenant until after he has performed the covenants on his part."

The application of these principles seems to be obvious. The obligations between Gray and Mills were mutual, — as binding on one as the other; they were dependent, — the performance by one being the consideration of the performance by the other; concurrent, — that is, the performance by each must be at the same time as that by the other. Could this be if the ability be not also concurrent, but may wait on either side the performance on the other? The doctrine of waiver does not apply. There may be a waiver of tender of performance, — of preparation of performance of the steps to make the ability immediately available. But efficient ability is back of, and is essential to, the obligations of the parties, and must actually exist in each independent of the other. Most of the adjudged cases turn on excuses for non-tender of performance, or of non-preparation, but there are some which depend on and clearly decide the principle I have expressed. See *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362, and cases cited; *Grandy v. McCleese*, 2 Jones (N. C.), 142; *Grandy v. Small*, 5 Jones (N. C.), 55; *Brown v. Davis*, 138 Mass. 458; *M'Gehee v. Hill*, 4 Port. (Ala.) 170. The latter case was an action by a vendee for a breach of contract for the delivery of a large quantity of corn and fodder, and the Court said: "It is a well-settled rule of law that when a contract is dependent, as where one agrees to sell and deliver and the other agrees to pay on delivery, in an action for non-delivery it is necessary for the plaintiff to prove a readiness to pay on his part, whether the other party was ready at the place to deliver or not. . . . The instruction of the Court, therefore, that if the party believed that the credit which the corn and fodder when delivered might give, together with the other means of the plaintiff, would have enabled him to raise the money so as to have been prepared to pay, that would be sufficient evidence of readiness, was erroneous."

These cases are not opposed by *Smith v. Lewis*, 24 Conn. 624, or *Southworth v. Smith*, 7 Cush. 391. The instance in the latter was the failure to count money which was present at the proper place for payment. The Court held that the defendant's absence excused it. A real ability existed. It required but a trifling physical act to make it available for the tender or the performance of the obligation to pay. In *Smith v. Lewis*, there was also a real and substantive ability to perform. To make it available for actual performance, certain preparations were necessary, and these preparations were held to have been excused under the circumstances of the case. There was a time and place agreed upon to perform the contract, where it was understood that certain preparations were to be made. It was held that the wilful absence of one of the parties excused the want of these preparations. The Court remarked, stating the principle, and summarizing the

facts: "But it is justly said that the proof must show that the plaintiff was 'ready and willing' to perform; and, the disposition and ability being proved, the only remaining objection relates to the degree of preparation. The plaintiff had not his money in his formal possession. He had not cleared his own estate from incumbrances, and had not prepared the title-deeds of his property. All these preparations he had suspended in view of his arrangement to meet the defendant, at which he had expected some facilities to be furnished by the defendant, not necessary, but convenient to himself; but all of which preparations he was able to complete, and would have completed, if the defendant had not, by his absence, under the peculiar circumstances of the case, induced him to desist."

The only resemblance of the case quoted to the case at bar is that facilities were to be furnished by the defendant. Here the resemblance stops. In the quoted case these facilities were convenient, not necessary. In the case at bar, for aught that appears, they were absolutely necessary. They alone could make the readiness. In the quoted case the plaintiff had provided for the money, and witnesses testified that it would have been ready. As to the \$2,000, the party who was to furnish it said that he knew the plaintiff must have a title to the place before security could be given witness, but he would have paid the money to plaintiff before the latter had received the deed, and relied on him afterwards. In the case at bar there is no ability—readiness—in plaintiff shown, of which it could be said that the facility which Mills' performance would have furnished Gray was "convenient, but not necessary." There is no testimony that Gray or Cavanaugh had either property or credit, or that they had ever been promised a loan on Mills' land. All the evidence on the subject comes from a witness by the name of Minto, who testified that he was a surveyor,—civil engineer,—and that he reported on land values for the Savings Union. After stating the value of the lands, the following question and answer were given, after some correction: "Q. By whose instructions or orders were you valuing those lands? A. The Savings Union." That an application had been made for a loan to that institution by Gray or Cavanaugh, we may assume; and also that it was so far entertained by the bank that it sent its surveyor to look at it. But whether its quality or value reported was satisfactory, there is no proof whatever. Therefore the case at bar does not satisfy the rule of *Smith v. Lewis*, even regarding it as a sound one. But the case has been criticised. The editors of *Smith's Leading Cases*, in a note to *Cutter v. Powell* (volume 2, p. 29), say of it: "There is no doubt that the case as decided by the majority goes to the verge of the law, and opens the door for experiments and tricks. . . . It is only by assuming as a certain fact that which the majority of the court did so assume, though, perhaps, on an insufficient finding, that the plaintiff could unquestionably have performed every item of his engagement, and would so have performed them, that the decision comes within safe principles."

The case, being an extreme one, should not be extended beyond its exact facts.

It follows that the last contention of defendants is correct, and there was not an ability to perform shown, which is a necessary condition of the recovery of damages.

Judgment will be entered for the defendants.

On writ of error the case was brought before the Circuit Court of Appeals, and after arguments before GILBERT, ROSS, and MORROW, Circuit Judges,

~~GILBERT~~ GILBERT, Circuit Judge, delivered the opinion of the Court.

In the bill of exceptions it is stated that there was no evidence whatever that plaintiff had any financial ability, or that it would have been possible for him to have raised an amount sufficient to pay the price asked by Donohoe for the Market Street lot, or that he had completed any arrangement to procure a loan for any amount whatever upon the lands which, under the contract alleged in the complaint, Mills was to convey to him in exchange for the Market Street lot. Upon the writ of error in this court it is urged that the Circuit Court ruled erroneously upon the law of the case in holding that the plaintiff could not recover, for the reason that he failed to prove that he had the "independent ability" to perform the contract, by showing that he had the means to purchase the Market Street lot from Donohoe, apart from any benefit to be derived through the cash and the land which were to come from Mills in exchange therefor. If we concede that that ruling was error, it does not follow that the judgment of the Circuit Court must be reversed. It becomes our duty to consider the whole of the findings, and to determine whether, upon a proper view of the law applicable thereto, the judgment is sustainable. The findings, in brief, are that the plaintiff and Mills had entered into a valid contract, whereby the former was to convey land estimated in the contract at \$235,000, in exchange for lands of the latter, estimated at \$115,000, and \$120,000 in cash. The land which the plaintiff was to convey did not belong to him, and he had not then, nor did he afterwards acquire, any estate or interest therein. He had received a written offer from the owner of the property to sell it for \$165,000 cash and one-half the taxes of the current year. The offer was never accepted. It was without consideration. It was a bare offer to sell, and could have been rescinded at any time. (In fact, the offer has no bearing upon the decision of this case.) It left the property in the same relation to the contract in which it would have stood had there been no such instrument. When Mills withdrew from the contract, he had discovered that the title to the land he was to purchase was not in the plaintiff, but was in Donohoe. (It is true that he did not place his refusal to perform upon that ground, but on the ground that the title in Donohoe was found to be defective;) but that fact is immaterial so far as this case is concerned.) The case presented for our consideration, therefore, is one in which the plaintiff made a contract to sell real estate of

which he was not the owner, and in which he had no right, title, nor interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner.)

It is contended by the plaintiff in error that the refusal of Mills to be bound by his contract, before the time for its completion had arrived, excuses the plaintiff from showing or proving that he had the ability to perform the contract upon his part. (It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part, nor his ability to carry out the contract; and, where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance.) But, in any case of action upon a contract, the elements of the plaintiff's damage must be certain, and the facts must exist from which it may be deduced that he has suffered loss. One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract. The pleadings and the finding in this case leave it uncertain whether the plaintiff could ever have acquired title to the Market Street lot. So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another.

In *Bigler v. Morgan*, 77 N. Y. 312, the Court said: "However positively a vendee may have refused to perform his contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed," — citing *Heron v. Hoffner*, 3 Rawle, 393, 400; *Bank of Columbia v. Hagner*, 1 Pet. 464; *Traver v. Halsted*, 23 Wend. 66.

In *Eddy v. Davis*, 116 N. Y. 247, 251, 22 N. E. 362, 363, the Court said: "The formal requisite of a tender may be waived, but to establish a waiver, there must be an existing capacity to perform. Here there was no existing capacity, as, having, sold all the adjacent lands plaintiffs could not perform their covenant to keep open a right of way back of defendant's store."

In *Townshend v. Goodfellow*, 40 Minn. 312, 41 N. W. 1056, the Court said: "And one who speculates upon that of which he has no control or the means of acquiring it is not a *bona fide* contractor. But the general rule is that, where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation."

In *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, the Court cited with

anticipating
breach.

disability

approval the rule of the English courts that: "Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power, by the ordinary course of law or equity, to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take: for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate. *Tendring v. London*, 2 Eq. Cas. Abr. 680."

Of similar import are *Carpenter v. Holcomb*, 105 Mass. 285; *Lawrence v. Miller*, 86 N. Y. 131; *Nelson v. Elevating Co.*, 55 N. Y. 480.

None of the cases cited by the plaintiff in error sustain the doctrine which he contends for. Among others is cited the case of *North's Adm'r v. Pepper*, 21 Wend. 636, where it was held, That if a purchaser of property gives notice to the vendor that he has abandoned the contract, and will not accept a conveyance, it is sufficient to support an action of the covenant by the vendor to allege the fact that he has received such notice, and it is not necessary that he aver a tender of the deed or readiness to perform, nor that he had title to the premises which he had agreed to convey. But the Court in that case expressly recognized the principle that, if the vendor had not the title nor such contractual relation thereto as to render it certain that he could procure the same, he had no ground upon which to recover damages, and held that, in the case of notice of refusal to perform the contract upon the part of the purchaser, it would be a sufficient defence to an action by the vendor to plead that the latter had no title. The case at bar comes directly within the principle declared in that case. It is alleged in the answer in the record in this case that the plaintiff had no title to the Market Street lot, and that allegation is affirmatively sustained by the findings. Judgment will be affirmed, with costs to the defendants in error.¹

¹ In *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, the plaintiff sued the defendant for breach of a contract to buy silk on August 15th. The Court said: "Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of tendering an instalment on that date and gave them an immediate right of action against the defendant for a breach of contract, nevertheless, when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15th, because the silk did not arrive in New York until a later day, it became evident that as to that instalment the sellers suffered no loss by the breach." Compare *Bradley v. Benjamin*, 46 L. J. Q. B. 590; *Lowe v. Harwood*, 139 Mass. 133; *Foternick v. Watson*, 184 Mass. 187, 193; *Smith v. Stoughton*, (Mass. 1904).

SECTION III.

IMPOSSIBILITY.

Take all

BAILY v. DE CRESPIGNY.

IN THE QUEEN'S BENCH, JANUARY 20, 1869.

[Reported in *Law Reports*, 4 *Queen's Bench*, 180.]

THE judgment of the Court (Cockburn, C. J., Lush, and Hayes, JJ.) was delivered by —

HANNEN, J. This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that 'neither he nor his assigns should or would, during the term, permit to be built any messuage, etc., on a paddock fronting the demised premises.' The breaches alleged are: 1. That the defendant during the term permitted a railway station to be built on the paddock. 2. That the defendant assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the paddock under powers given them by act of Parliament, 1862, for purposes for which they were by the act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the act; and that the company under the powers so conferred, did compulsorily purchase and take the paddock; and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea; and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the act of Parliament, and without any stipulation introduced into the conveyance of the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed

poll declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do — namely, conveys to the company — and one who by refusing to convey obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses compliance. (In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim *Lex non cogit ad impossibilia*.

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.¹

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.²

It is on this principle that the act of God is in some cases said to excuse the breach of a contract. (This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham v. Barry*, 15 C. B. at p. 619; 24 L. J. (C. P.) at p. 106, a man might by apt words bind himself that it shall rain tomorrow or that he will pay damages. This is the explanation of the case put by Lord Coke in *Shelley's case*, 1 Rep. at p. 98, a: 'If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by

¹ See *Kelley v. Insurance Co.*, 109 Fed. Rep. 56, 114 Fed. Rep. 268.

² The preceding thirteen lines are quoted by Jackson, J., in *Chicago, &c. Ry. Co. v. Hoyt*, 149 U. S. 1, 1^a.

tempest, he is discharged of his covenant," because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. (See *Shep. Touch.* 173.) It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability. Again, to quote an observation of Maule, J., in *Mayor of Berwick v. Oswald*, 3 E. & B. 665; 23 L. J. (Q. B.) at 324, there is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; . . . but people in general must always be considered as contracting with reference to the law as existing at the time of the contract. . . . And the words showing a contrary intention ought to be pretty clear to rebut that presumption." To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in *Brewster v. Kitchell*, 1 Salk. 198, that "where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. *Spencer's case*, 5 Rep. 16. The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee; because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of Parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in *Brewster v. Kitchell*, 1 Salk. 198, rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is *empowered* to do, as those which it is *required* to do; why, then, should there be a difference in the liability of the covenantor with respect to the one and the other?

But, assuming that the imposing on the defendant by the legislature of assigns whom he could not control would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that, though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair consideration for the right to build.

It appears to be assumed in this argument that the difference between the price of the land encumbered with the covenant not to build and the price of it freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so; the plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if these damages should exceed the whole value of the land taken. [No doubt, if the legislature had in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway acts any express or implied enactment to this effect. It has been already pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How could it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an

inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken?

Further, if the covenant of the defendant is to be considered as broken by the act of the railway company so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee, with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay, by way of compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.

We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person, in the position of the plaintiff, having taken a covenant from his lessor on the terms of that under consideration, or that, if such had been the intention of the legislature, so peculiar a head of compensation as that now suggested, namely, for liability to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act.

For these reasons we are of opinion that our judgment ought to be for the defendant.

*Judgment for the defendant.*¹

¹ Impossibility created by law was held an excuse for non-performance in *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *Commissioners v. Young*, 59 Fed. Rep. 96, 108; *Dunham v. New Britain*, 55 Conn. 378; *Scovill v. McMahon*, 62 Conn. 378; *Kuhn v. Freeman*, 15 Kan. 423; *Gammon v. Blaisdell*, 45 Kan. 221; *Theobald v. Burleigh*, 66 N. H. 574; *Brick Church v. New York*, 5 Cow. 538; *Kaiser v. Richardson*, 5 Daly, 301; *Jones v. Judd*, 4 N. Y. 412; *Burkhardt v. Georgia School Township*, 9 S. Dak. 315; compare *Klauber v. Street Ry. Co.*, 95 Cal. 353; *Newport News Co. v. McDonald Brick Co.'s Assignee*, 59 S. W. (Ky.) 332; *Baker v. Johnson*, 42 N. Y. 126.

But impossibility owing to foreign law does not excuse. *Barker v. Hodgson*, 3 M. & S. 267; *Spence v. Chodwick*, 10 Q. B. 517; *Kirk v. Gibbs*, 1 H. & N. 810; *Clifford*

LORD CLIFFORD v. WATTS.

IN THE COMMON PLEAS, JUNE 7, 1870.

[Reported in *Law Reports*, 5 *Common Pleas*, 577.]

WILLES, J. This is an action upon a demise or grant by Lord Clifford to Watts of certain mines, pits, etc., of clay, by which demise the rent was made payable at a certain rate per ton upon the clay raised; and the indenture contained, amongst others, a covenant that Watts shall work and make trials for clay under the lands in question. (The first breach is founded upon that covenant, and in respect of that the defendant has paid 40s. into court.) The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1,000 tons, or more than 2,000 tons, of pipe or potter's clay in each year of the term. The term granted was twelve years; and for the pipe or potter's clay the defendant was to pay a royalty of 2s. 6d. per ton. (The breach assigned on that covenant is that with which we have to deal on this occasion; it is, that the defendant has not dug an aggregate amount of not less than 1,000 tons of pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question, is, that the defendant could not dig 1,000 tons of clay each year according to his covenant, because there was not at the time of the demise, nor since existing under the lands, 1,000 tons of such clay; that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same.) To that plea there is a demurrer. It is obvious that this plea may be considered from two points of view: First, with reference to the abstract question whether a covenant to perform an impossibility is or is not valid in point of law; whether the covenantor can set up such impossibility from the beginning as an answer to a breach, or must pay damages, which, according to Mr. Preston (*Shep. Touch.* 7th ed. 164), may only be nominal. The second, and with reference to this case the most important, consideration appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of the covenant, construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipulated tonnage as if the clay had been raised but rather, dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an inde-

v. Watts, L. R. 5 C. P. 577, 586; *Cunningham v. Dunn*, 3 C. P. D. 443; *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; *Ashmore v. Cox*, [1899] 1 Q. B. 436; *Tweedie Trading Co. v. James P. Macdonald Co.*, 114 Fed. Rep. 985; *Beebe v. Johnson*, 19 Wend. 500.

pendent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case, and after having heard the very learned arguments on both sides, my opinion inclines.

The deed, without any recital, witnesses that Lord Clifford, in consideration of the rent, payments, covenants, etc., demised to Watts the mines, pits, etc., of clay under certain lands particularly described. It then proceeds to grant Watts a license to enter upon the land to dig and search for clay and to make pits, etc., with rights of way for carrying it away, etc., subject to compensation for damage. Then comes the habendum, — to have, hold, etc., the said mines, etc., of pipe and potter's or other clay, with the powers thereby granted, for twelve years, and to have and to hold all and every the said beds or veins of clay that shall be found and raised within the term out of any part of the land so authorized to be worked, unto Watts, his executors, etc., unto his and their own use. So far we are dealing with the demising part of the instrument, which refers to specific lands and to specific clay which is believed by both parties to be under the lands described at the time. The whole scope of the contract is that the defendant shall take that clay. Whether the speculation would turn out to be a profitable one to the tenant or not was uncertain. So far it was natural that he should take the risk. But the question is whether we are justified in importing another element into a bargain like this, namely, a warranty by the tenant that clay shall be found, or an undertaking to pay for the quantity stipulated for, whether found or not. The provision for payment follows in the reddendum, by which Watts is to pay Lord Clifford, "in respect of all pipe and potter's clay being to be dug, got, or obtained from or under the surface of any of the lands, 2s. 6d. per ton," and 6d. per ton for other clay, to be paid half-yearly; and Watts was further to pay £100 per acre for any land which, having been worked, should not be restored to a state fit for agricultural purposes. The indenture then proceeds in the ordinary way to the covenants on the part of the tenant. Watts covenants with Lord Clifford for payment of the rent, and that he will cause all the clay raised to be conveyed by a certain canal at rates provided for by the lease. Then follow covenants for making satisfaction for surface damage, and for payment of a kind of rent to the tenants for land required for the working of the pits, — a covenant that Watts will, during the continuance of the term, work and make trials for clay in and under the land according to the best and most improved methods, etc., which is the subject of the first breach. Then comes a covenant that the lessee will do the least possible damage to the land {after which follows the covenant in question, and also that Watts, his executors, etc., shall dig and remove from the land demised "an aggregate amount of not less

than 1,000 tons, nor a larger quantity than 2,000 tons, of pipe or potter's clay in each and every year of the term hereby granted." Then comes a covenant to keep accounts of all clay raised; and the remainder of the deed may be dismissed with this observation,—that there is no stipulation that the tenant shall pay any sleeping rent or minimum rent, or any rent in the event of no clay being raised during the term, or not being there to be raised, nor any provision for putting an end to the term in case the clay should be exhausted.) The result to my mind is, that the covenant upon which the second breach is assigned is one of a series of subsidiary covenants introduced for the purpose of carrying out the substantial object and intention of the parties, namely, that Watts should have the right during the term of working out all the clay under the land, and pay for it at the prices specified per ton; and this subsidiary covenant deals with the rate at which the clay is to be worked out.) The bare statement of the provisions of the deed leads me to the conclusion that the tenant never intended to warrant that there was clay upon the land, and that neither party contemplated that he should, in the event of no clay being found there, at all events pay a minimum fixed rent during the term. It is a bare stipulation as to the rate of payment for the clay which should be raised. That appears to me to be the natural and ordinary construction of the covenant when read by the light of the context. It turned out that there was no clay of the descriptions mentioned on the land. The covenant therefore became inapplicable, and has not been broken.¹

It may be that the allegations in the plea are untrue. That, however, we are precluded from considering; for the purpose of the demurrer, we must assume the plea to be true. It may be that the defendant has taken upon himself the burthen of searching for clay, and of proving at the trial that he has searched so effectually that clay must have been

¹ "Now, how are we to construe a covenant in which the words are large enough to include everything, but in which they must have some restriction if they are not to lead to absurdity? They are restricted, as we have seen, to acts done by the defendant or a person claiming to do those acts under him. On principle, a covenant is operative with regard to a thing which is contemplated by both the parties when it is entered into, and its interpretation does not depend on the meaning which either of them had, but upon the meaning which both of them must have had. Words which are too large, how is their real meaning to be got at? We cannot say they are contrary to the words; but we may say this (and it always is said), the parties, when they used the words, have intended them to include all circumstances which were contemplated at the moment, and which it can be shown to have been contemplated, or which, if they had thought properly about the matter, would have been contemplated. Beyond that the meaning of the covenant cannot be ascertained. If nothing has happened, which it is obvious that no one contemplated, it must be held that they did not intend it." *HARRISON v. MUNCASTER* (1891), 1 Q. B. 101.

The courts have been of the courts to treat questions of impossibility as questions of law. See *Moore v. Sun Printing Assoc.*, 101 Fed. Rep. 456, 142 N. Y. 456, 462; *Buffalo, &c. Co. v. Bellevue, &c.*, 101 Pa. 291, and in many other cases.

discovered if it had existed, and so establishing the impossibility of performance of this covenant by reason of there being no clay to be found. But for the purpose of the construction of the covenant, we must assume that there was none. Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible. But before we arrive at such a conclusion we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible. The authorities relied on for the plaintiff appear to me to be cases where a man either undertook to do a thing which was possible at the time, but which, without any fault of his adversary, became afterwards impossible, or where he, notwithstanding the thing was impossible of performance, took upon himself to warrant that it should be possible. *Barker v. Hodgson*, 3 M. & S. 267, was a case where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, and yet he was held to be responsible in damages for the non-performance of his covenant. If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of *Paradine v. Jane*, Aleyn, 26, where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient. The material resolution of the court was, that "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own

¹ See *Pollock, Cont.* (7th ed.) 400; *Stratford Gas Co. v. Stratford*, 26 Ont. App. 109; *Bennett v. Morse*, 6 Col. App. 122.

folly that has led him to make such a bargain without providing against the possible contingency. In the present case, if the allegations in the plea be true, there was nothing upon which the covenant could attach at the time it was entered into. *Hills v. Sughrue*, 15 M. & W. 253, has no application, for another reason. There the charterer by his contract warranted that, the ship being ready to take a cargo of guano at Ichaboe, he would there provide her with a full cargo. The impossibility of obtaining a cargo there was no excuse for the non-performance of his contract. That case therefore falls within the second category of cases, where the defendant had warranted the possibility of doing the thing contracted for. It remains only to deal with *Marquis of Bute v. Thompson*, 13 M. & W. 487. There, by the express terms of the contract, the lessee covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked; and the lessee failing to raise the stipulated quantity of coal, he was held bound at all events to pay the minimum rent. The judgment of the court is very short, and but for the facts might possibly be taken to bear the construction put upon it by Mr. Kingdon, namely, that the lessee was bound to perform his covenant whether there was coal to be found or not. The judgment, however, must be read with reference to the subject-matter with which the court was dealing; and so reading it, it is plain that the court construed the covenant, not as a stipulation exhausting itself upon the first branch as to the raising of the coal, but as an alternative covenant to secure the lessor at all events a minimum rent during the term, whether or not coal was worked or was there to be worked.¹ There is, however, no such covenant here; there is only a covenant to work out all the clay under the land, and this covenant was not broken by the defendant's failure to work clay if none was to be found there. I therefore think the defendant is entitled to judgment.

MONTAGUE SMITH, J. I am of the same opinion. The result of a decision in favor of the plaintiff would be to give him a fixed minimum rent when he has not covenanted for it. I do not, however, express any opinion as to what would be the measure of damages for a breach of this covenant. Taking the whole of the deed together, I confess I do not think it admits of such a construction. (Seeing the part of the indenture in which the covenant in question is found, it seems to me that it means no more than it expresses by necessary implication, namely, that the lessee shall work a given quantity of clay, if clay be found in the land.) It is the clay in the land which is the subject of the grant. Any other construction would, I think, defeat the apparent intention of the parties. [The covenant is based on the assumption that

¹ *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665; *McDowell v. Hendrix*, 67 Ind. 513; *Valley City Milling Co. v. Prange*, 123 Mich. 211; *Wharton v. Stoutenburgh*, 46 N. J. L. 151; *Timlin v. Brown*, 158 Pa. 606, acc. Compare *Monnett v. Potts*, 10 Ind. App. 191.

there was clay there. It was impossible to perform it unless there was; and the covenantor did not undertake to perform an impossibility, but merely to dig and remove such clay as should be found in the land, to the extent stipulated for. If there was nothing upon which the covenant could attach, it fails. There is nothing in the deed which amounts to a warranty. The whole scope of it was that the plaintiff should receive a royalty on the clay if found. If the failure to find clay of the description mentioned was the result of the defendant's omission to make proper searches, the grantor has his remedy. My brother Willes has so fully gone into the several covenants in the deed, and distinguished the cases cited from the present, that I do not think it necessary to say more. I will merely add that, in the case of *Marquis of Bute v. Thompson*, 18 M. & W. 487, there was a covenant for a minimum rent, whether coal was got or not. That rent was clearly payable whether the coal existed or was searched for or not. There is no such covenant here. In truth, the plaintiff is seeking by this action, so far as the second breach is concerned, to get something he has not contracted for.

BRETT, J. I think it is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted. But here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there, and the covenant is applicable only if there be clay; it does not amount to a warranty on the part of the grantee that there was clay, or to an engagement to pay the royalty although it should turn out that there was none. I will merely add a word upon the case of *Hills v. Sughrue*, 15 M. & W. 253. There the contract was that the ship should proceed to Ichaboe, and the charterer engaged to furnish there a full cargo of guano. There was nothing unreasonable or unusual in such a contract, and it was clearly no answer for the charterer to say that there was no guano at the island when the ship arrived there. I agree that there must be judgment for the defendant.

Judgment for the defendant.

¹ *Ridgely v. Conewago Iron Co.*, 53 Fed. Rep. 988; *Gribben v. Atkinson*, 64 Mich. 651; *Blake v. Lobb's Estate*, 110 Mich. 608; *Buchanan v. Layne*, 95 Mo. App. 148; *Cook v. Andrews*, 38 Ohio St. 178; *Brick Co. v. Pond*, 38 Ohio St. 65; *Muhlenberg v. Henning*, 116 Pa. 138; *Boyer v. Fulmer*, 176 Pa. 282, acc. See also *Nordyke & Marmion Co. v. Kehler*, 155 Mo. 643.

HOWELL v. COUPLAND.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, JANUARY 18,
1876.

[*Reported in Law Reports, 1 Queen's Bench Division, 258.*]

APPEAL by the plaintiff from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the defendant.

The plaintiff is a potato merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode in the same county.

In 1872 the defendant, at the proper season, and in the due course of husbandry, appropriated between eighty and ninety acres of land for the growth of potatoes, — sixty-eight acres at Whaplode, and about twenty at Holbeach.

In March of the same year the plaintiff and the defendant entered into the following contract: "A memorandum of agreement, made this day of , 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of regent potatoes grown on land belonging to the said Robert Coupland in Whaplode, at and after the rate of £3 10s. 6d. per ton, to be riddled on 1½-in. riddle, and delivered at Holbeach railway station, good and marketable ware, during the months of September or October, as the said John Howell may direct, and, under his direction, the purchaser to find riddles. It is further agreed between the said Robert Coupland and the said John Howell that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract, out of the sixty-eight acres in Whaplode, twenty-five were actually sown with potatoes, and the remaining forty-three acres were ready for sowing. The forty-three acres were afterwards sown in due course, and the whole sixty-eight acres together were amply sufficient, in an ordinary season and in the ordinary course of cultivation, to produce a much larger quantity than two hundred tons, the land producing, on an average, seven tons to the acre.

In July and August, without any fault on the part of defendant, a disease, which no skill or care on the part of the defendant could have prevented, attacked the crop and caused it to fail; and when the time for taking it up arrived, the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach together, amounted to no more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease.

If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which in fact he had not, it would have been too late to sow it.

The present action was brought to recover damages for the non-delivery of the residue of the two hundred tons, and the verdict at the trial was entered for £432 5s., leave being reserved to move to enter the verdict for the defendant, on the ground that he was not liable to deliver the ungrown potatoes.

A rule having been obtained accordingly, it was made absolute by the Court of Queen's Bench on the 22d of May, 1874.

D. Seymour, Q. C., and *Waddy*, Q. C., in support of the motion.

Herschell, Q. C., and *Beasley*, *contra*, were not heard.

LORD COLERIDGE, C. J. I am of opinion that the judgment ought to be affirmed. [The Lord Chief Justice read the contract and facts.] The Court of Queen's Bench held that, under these circumstances, the principle of *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. (Q. B.) 164, and *Appleby v. Myers*, L. R. 2 C. P. 651, applied, and the defendant was excused from the performance of his contract. The true ground, as it seems to me, on which the contract should be interpreted, and which is the ground on which, I believe, the Court of Queen's Bench proceeded, is that by the simple and obvious construction of the agreement, both parties understood and agreed that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance. [They had been in existence, and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance.] It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused. I am, therefore, of opinion that the judgment of the Queen's Bench should be affirmed.

JAMES, L. J. I think the case was rightly considered in the court below to turn upon the construction of the contract. Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied; or is it a contract to deliver two hundred tons of potatoes out of a specific crop? I am of opinion it is the latter; and if so, the principle of the cases relied on applies, and the defendant is excused by reason of his being prevented by causes for which he is not answerable.

MELLISH, L. J. I am of the same opinion. The words of the contract are clear: the defendant "agrees to sell two hundred tons of regent potatoes grown on land belonging to him in Whaplode." That is, potatoes which shall be grown in Whaplode. They are to be grown there, and delivered to the plaintiff provided they are grown there. Is not that a condition,—so that, according to the cases on which the Court of Queen's Bench acted, if the thing perishes

before the time for performance, the vendor is excused from performance by the delivery of the thing contracted for? No doubt there is a distinction in the present case, that the potatoes, the things contracted for, were not in existence at the time the contract was entered into. But can that make any real difference in principle? Suppose the potatoes had been full grown at the time of the contract, and afterwards the disease had come and destroyed them; according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied.

BAGGALLAY, J. A. I at first doubted whether the contract excluded the possibility of the defendant being able to perform his contract by delivering potatoes grown on other land; but on consideration it is clear the contract is confined to particular land; and the statement in the case is that sixty-eight acres, the amount actually sown with potatoes, was a due proportion to enable the defendant to perform his contract in an ordinary season.

CLEASBY, B. I am of the same opinion. I put my decision, not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has become impossible by *vis major*. Here there was not an absolute contract to deliver two hundred tons of potatoes in September and October, but two hundred tons of potatoes grown on particular land. Not two hundred tons of potatoes simply, but two hundred tons off particular land. (The crop on this particular land has failed, and there is nothing to which the promise can apply.) If the crop had existed at the time of the contract, and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract.

*Appeal dismissed.*¹

¹ Browne v. United States, 30 Ct. Cl. 124; Ontario Fruit Assoc. v. Cutting Packing Co., 134 Cal. 21; Losecco v. Gregory, 108 La. 648, *acc.*

See also Nickoll v. Ashton, [1901] 2 K. B. 126; Stewart v. Stone, 127 N. Y. 500. Compare Ashmore v. Cox, [1899] 1 Q. B. 436; Jones v. United States, 96 U. S. 24; Summers v. Hibbard, 153 Ill. 102; Booth v. Mill Co., 60 N. Y. 487.

ANDERSON v. MAY ET AL.

MINNESOTA SUPREME COURT, JUNE, 1892.

[Reported in 52 Northwestern Reporter, 530.]

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market-gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified, — a contract in its nature possible of performance. As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early, unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity. What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of, the party." An application of this rule is furnished by *Cowley v. Davidson*, 13 Minn. 92. What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing

when the agreement is made would come under this exception.] The exception was extended further than in any other case we have found in *Howell v. Coupland*, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in *Adams v. Nichols*, 19 Pick. 275, 279; *School Dist. v. Dauchy*, 25 Conn. 530; and *Trustees v. Bennett*, 27 N. J. Law, 513, approved and followed in *Stees v. Leonard*, 20 Minn. 494. Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

*Order reversed.*¹

JOHN A. STEES v. CHARLES LEONARD.

MINNESOTA SUPREME COURT, APRIL, 1874.

[Reported in 20 *Minnesota*, 494.]

THE defendants, who are architects and builders, having, at plaintiff's request, furnished them with plans and specifications for a building proposed to be erected by them on their own land, afterwards, and on the 18th August, 1868, the plaintiffs and defendants made and executed a contract under seal, in which they are all described as "of the city of St. Paul," etc. By the terms of the contract, the defendants "agree to and with the said John A. and Washington M. Stees, to well and truly build, erect, and complete the three-story business house proposed to be erected by the said J. A. & W. M. Stees, on Minnesota Street, between Third and Fourth streets; all in accordance with the plans and specifications of the same, with such alterations as are mentioned in said specifications, prepared by M. Sheire & Bro., architects,

¹ Compare *Rice v. Weber*, 48 Ill. App. 573.

and signed by both parties; the building, with the exception of painting, to be completed on or before the first day of January, 1869. In consideration whereof the said John A. & W. M. Stees . . . agree to pay, or cause to be paid, unto the said Charles Leonard, Monroe and Romaine Sheire, . . . the sum of \$6,785 in payments as follows: \$500 when the excavation is completed; \$800 when the basement walls are up; \$800 when the first-story walls are up; \$1,000 when the second-story walls are up; \$1,200 when the third-story walls are up and the roof on; \$1,200 when the plastering is done; and the balance when the building is completed." The specifications annexed to the contract are very full, and provide (among other things) that "All the walls shall be of the following thickness: foundation walls, two feet thick, and shall have footings six inches thick, which shall run clear across walls and project six inches on each side of wall above it." The specifications contain no other provisions relating to the character of the foundation for the building.

The defendants entered upon the performance of the contract and erected the proposed building to a height of three stories, when it fell to the ground, on the 1st November, 1868. In the following year the defendants again attempted to perform the contract, and again erected the building to the same height as before, when it again fell, on the 1st August, 1869, whereupon the defendants abandoned the work, and refused to perform the contract.¹

At the trial in the district court for Ramsey County, the defendants made the following offers of proof: —

That at the time when plaintiffs applied to defendants to draw plans and specifications for the building mentioned in the complaint, the matter of draining the lot on which the building was to be erected was talked over between the parties; and that the plaintiffs then stated that they did not think that such lot would need draining, but if any draining should be needed, they would do it.

To which the plaintiffs objected as incompetent, immaterial, and irrelevant, and because the contract was in writing.

That in architecture and building, "footings," when used in a building, are the lowest portion of the structure, and the only artificial foundation employed for the building, when footings are employed.

That they constructed each of these buildings that fell, in all respects as required by the contract and specifications.

The evidence thus offered, as well as that contained in two other offers of proof, stated in the opinion, was objected to as incompetent, irrelevant, and immaterial, and in each case the objections were sustained, and the defendants excepted.

The jury found for the plaintiffs. The defendants moved, upon a bill of exceptions, for a new trial, and appeal from the order denying their motion.

¹ A statement of the pleadings is here given in the case as reported.

Lampreys, and Giffillan & Williams, for appellants.

Bigelow, Flandrau, & Clark, for respondents.

YOUNG, J. The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract, are collected in the note to *Cutter v. Powell*, 2 Smith Lead. Cas. 1.

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In *Adams v. Nichols*, 19 Pick. 275, the defendant Nichols contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed, when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to *Walton v. Waterhouse*, 2 Wms. Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In *School Dist. v. Dauchy*, 25 Conn. 530, the defendant contracted to build and complete a schoolhouse. When nearly finished, the building was struck by lightning, and consumed by the consequent fire; and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this non-performance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

School Trustees v. Bennett, 3 Dutcher, 513, is almost identical in its material facts with the present case. The contractors agreed to build and complete a schoolhouse, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the con-

tract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. . . . If before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. . . . No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. . . . Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, *necessarily* prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defence, and overruled by the court."

In *Dermott v. Jones*, 2 Wall. 1, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted, in vindication of the wisdom and justice of the rule, which must govern this case unless it is in some way distinguishable from the cases cited.

It is argued that the spot on which the building is to be erected is not designated with precision in the contract, but is left to be selected by the owner; that, under the contract, the right to designate the particular spot being reserved to plaintiffs, they must select one that will sustain the building described in the specifications, and if the spot they select is not, in its natural state, suitable, they must make it so; that in this respect the present case differs from *School Trustees v. Bennett*.

The contract, does not, perhaps, designate the site of the proposed building with absolute certainty; but in this particular it is aided by the pleadings. The complaint states that defendants contracted to erect the proposed building on "a *certain piece* of land of which the plaintiffs then were and now are the owners in fee, fronting on Minnesota Street, between Third and Fourth streets, in the city of St. Paul." The answer expressly admits that the defendants entered into a contract to erect the building, according to the plans, &c., "on that certain piece of land in said complaint described," and that they "entered upon the performance of said contract, and proceeded with the erection of said building," &c. This is an express admission that the contract was made with reference to the identical piece of land on which the defendants afterwards attempted to perform it, and leaves no foundation in fact for the defendants' argument.

It is no defence to the action, that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building, they were bound by the contract to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations. If the building could not be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building." (8 Dutcher, 525; and see *Dermott v. Jones*, *supra*, where the same point was made by the contractor, but ruled against him by the court.)

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. The prior parol agreement that plaintiffs should drain the land, related, therefore, to a matter embraced within the terms of the written contract, and was not, as claimed by defendants' counsel, collateral thereto. It was, accordingly, under the

familiar rule, inadmissible in evidence to vary the terms of the written contract, and was properly excluded.¹

In their second and third offers, the defendants proposed to prove that after the making of the written contract, and when the defendants, in the course of their excavation for the cellar and foundation, first discovered that the soil, being porous and spongy, would not sustain the building, unless drained, the plaintiffs proposed and promised to keep the soil well drained during the construction of the building; that, in consequence, the defendants did not drain the same; that plaintiffs for a time kept the soil drained, but afterwards and just before the fall of the building, they neglected to drain, in consequence of which neglect the soil became saturated with water, and the building fell; and that a like promise was made by plaintiffs at the beginning of the erection of the second building, followed by like part performance and neglect, and subsequent, and consequent, fall of the building.

The rule that a sealed contract cannot be varied by a subsequent parol agreement, is of great antiquity, the maxim on which it rests, *quumquodque dissolvitur eodem modo quo ligatur*, being one of the most ancient in our law. (Broom Leg. Max. 877; 5 Rep. 26 a, citing Bracton, lib. 2, fol. 28; and see Bracton, fol. 101.) In early days the rigor with which it was enforced in the courts of law led to the interference of chancery to prevent injustice. (Per Lord Ellesmere, Earl of Oxford's case, 2 Lead. Cas. in Eq. 508*; 1 Spence, Eq. Jur. 636.) In later times that rigor has become much relaxed, although the English courts of law have refused to permit sealed contracts to be varied by parol in cases of great hardship. *Littler v. Holland*, 3 T. R. 590; *Gwynne v. Davy*, 1 Man. & Gr. 857; *West v. Blakeway*, 2 id. 729; and see *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 128.

But in this country it has become a well settled exception to the rule, that a sealed contract may be modified by a subsequent parol agreement, if the latter has been executed, or has been so acted on that the enforcing of the original contract would be inequitable. *Monroe v. Perkins*, 9 Pick. 298; *Mill-dam Foundry v. Hovey*, 21 Pick. 417; *Blasdel v. Souther*, 6 Gray, 149; *Foster v. Dawber*, 6 Ex. 854, and note; *Thurston v. Ludwig*, 6 Ohio St. 1; *Delacroix v. Bulkley*, 13 Wend. 71; *Allen v. Jaquish*, 21 Wend. 628; *Vicary v. Moore*,

¹ *Dermott v. Jones*, 2 Wall. 1; *Autcliff v. McAnally*, 88 Ala. 507; *School District v. Dauchy*, 25 Conn. 530; *Parker v. Scott*, 82 Iowa, 266; *Haynes v. Second Baptist Church*, 88 Mo. 285; *Leavitt v. Dover*, 67 N. H. 94; *Trustees v. Bennett*, 3 Dutch. 513; *Tompkins v. Dudley*, 25 N. Y. 272; *Lawing v. Rintles*, 97 N. C. 380; *Galyon v. Ketchen*, 85 Tenn. 55, acc. See also *Brown v. Royal Ins. Co.*, 1 E. & E. 853; *Simpson v. United States*, 172 U. S. 372; *Schliess v. Grand Rapids*, 90 N. W. (Mich.) 700; *Hanthorn v. Quinn*, 69 Pac. Rep. (Oreg.) 817.

As to whether accidental calamity excuses delay in completing a building, see *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Dodd v. Churton*, [1897] 1 Q. B. 563; *Cannon v. Hunt*, 113 Ga. 601; *Cochran v. People's Ry. Co.*, 131 Mo. 607; *Ward v. Hudson River Building Co.*, 1 Silvernail (N. Y.), 341; *Reichenbach v. Sage*, 13 Wash. 364; *Bentley v. State*, 73 Wis. 416.

2 Watts, 451; Lawall v. Rader, 24 Penn. St. 283; Carrier v. Dilworth, 59 id. 406; Richardson v. Cooper, 25 Me. 450; Lawrence v. Dole, 11 Vt. 549; Patrick v. Adams, 29 Vt. 376; Siebert v. Leonard, 17 Minn. 436; Very v. Levy, 13 How. 345; 1 Sm. Lead. Cas. (6th ed.) 576.

Whether the evidence offered shows a valid consideration for the plaintiff's promise, or whether it shows that such promise, though without consideration, has been so acted on as to enure, by way of estoppel or otherwise, to release defendants from their obligation to drain, are questions that were fully discussed at the bar, but which we are not called upon to determine; for the objection is well taken by counsel for the plaintiffs, that the evidence embraced in the second and third offers is inadmissible under the pleadings.

In their answer, the defendants allege an offer and promise by plaintiffs (made after the defendants had commenced work under the contract), to keep the land drained during the erection of the building. No consideration is alleged for this promise, and, as *nudum pactum*, it could of itself, have no effect to vary the obligations imposed on the defendants by the sealed contract. The answer proceeds to allege "that the plaintiffs wholly and wrongfully failed and neglected to drain or cause to be drained the said piece of land, or any part of the same." It is clear that the defendants would have no right to rely on this naked promise, followed by no acts of plaintiffs in part performance. If the defendants went on with the building, without taking the precaution to drain the land, they proceeded at their own risk. The answer sets up no facts on which an estoppel can be founded, and shows no defence to the action.

But the defendants, at the trial, offered to prove, not only that the plaintiffs offered to drain the land, but also "that the plaintiffs did, for a time, keep the same drained, . . . but afterwards they neglected to do so," &c. Assuming that the facts offered to be proved would constitute a defence (and we are not prepared to say they would not) no such defence is pleaded in the answer.

The tendency of this proof was to establish a new defence, not pleaded, and to contradict, rather than sustain, the allegations of the answer. For this reason it was inadmissible, even if the facts offered to be proved would, if admissible, constitute a defence to the action. If the proof offered would have no such tendency, it was immaterial, and for this reason also was rightly excluded. And as all the evidence embraced in each offer was offered as a whole, and a part thereof was inadmissible, the entire offers were properly rejected.

The objection that the evidence offered was "incompetent, irrelevant, and immaterial," was sufficiently specific. The defendant's counsel must know the contents of the answer, and that evidence inconsistent therewith is inadmissible, if objected to.

There was, therefore, no error in the exclusion of the evidence offered, and the order appealed from is affirmed.

ALONZO M. BUTTERFIELD v. NAPOLEON L. BYRON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 23, 1890 —
MAY 19, 1891.

[Reported in 153 Massachusetts, 517.]

CONTRACT, brought in the name of the plaintiff for the benefit of certain insurance companies, for breach of a building contract entered into between the plaintiff and the defendant. At the trial in the Superior Court, before BARKER, J., there was evidence tending to show the following facts: —

On November 13, 1888, the plaintiff, who owned a parcel of land in the town of Montgomery, on which he intended to build a hotel, and the defendant, who was a builder, entered into the contract in question, which contained the following provisions: —

"The said N. Byron covenants and agrees to and with the said A. M. Butterfield to make, erect, build, and finish in a good, substantial, and workmanlike manner, a three and one half story frame hotel upon lot of land situated in Montgomery, Mass., said hotel to be built agreeable to the draught, plans, explanations, or specifications furnished, or to be furnished, to said A. M. Butterfield by Richmond and Seabury, of good and substantial materials, and to be finished complete on or before the twentieth day of May, 1889.

"And said A. M. Butterfield covenants and agrees to pay to said N. Byron for the same eight thousand five hundred dollars, as follows: seventy-five per cent of the amount of work done and materials furnished during the preceding month to be paid for on the first of the following month, and the remaining twenty-five per cent to be paid thirty days after the entire completion of the building."

By the specifications referred to, the plaintiff was to do the grading, excavating, stone-work, brick-work, painting, and plumbing.

The time for completing the contract was subsequently extended to June 10, 1889, and a provision was made that the defendant should forfeit \$15 for every day's default after that date. Up to May 25, 1889, the defendant had complied with the contract as far as he had gone, and had almost finished the building. The plaintiff, who had insured his interest in the building with the companies for whose benefit the action was brought, had up to the same time made payments to the defendant amounting to \$5,652.80, for work done and materials furnished. On May 25 the building was struck by lightning and burned to the ground, by which event it was rendered impossible for the defendant to complete the building within the required time. The companies in which the plaintiff had insured paid him the sum of \$6,914.08, viz. \$5,652.80 for advances made to the defendant, and \$1,261.78 for work done and materials furnished by the plaintiff in

laying the foundations; and the plaintiff assigned to the companies whatever claims he might have against the defendant for breach of the contract.) The plaintiff never made any demand upon the defendant to rebuild, nor offered to lay the necessary foundations for a new building.) The defendant never called upon the plaintiff to lay such foundations, nor offered to rebuild. 7

At the trial, the plaintiff contended that he was entitled to recover in his action (1) the whole of the sum of \$6,914.08, (2) \$38 for certain shingles and window weights that had been saved from the fire and carried away by the defendant, and (3) the amount forfeited under the contract at the rate of \$15 a day from June 10, 1889, to the date of the writ.

Upon these facts the judge directed a verdict for the defendant, and reported the case for the determination of this court, such order to be made as this court might direct.

The case was argued at the bar in September, 1890, and afterwards, in February, 1891, was submitted on the briefs to all the judges.

G. D. Robinson, for the plaintiff.

G. M. Stearns (*W. B. Stone* with him), for the defendant.

KNOWLTON, J. [It is well-established law that where one contracts to furnish labor and materials, and construct a chattel or build a house on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it.] *Adams v. Nichols*, 19 Pick. 275; *Wells v. Calnan*, 107 Mass. 514; *Dermott v. Jones*, 2 Wall. 1; *School Trustees of Trenton v. Bennett*, 3 Dutcher, 513; *Tompkins v. Dudley*, 25 N. Y. 272. [It is equally well-settled that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence; and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other.] *Taylor v. Caldwell*, 3 B. & S. 826; *Lord v. Wheeler*, 1 Gray, 282; *Gilbert & Barker Manuf. Co. v. Butler*, 146 Mass. 82; *Eliot National Bank v. Beal*, 141 Mass. 566, and cases there cited; *Dexter v. Norton*, 47 N. Y. 62; *Walker v. Tucker*, 70 Ill. 527. [In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.]

The fundamental question in the present case is, What is the true

1. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates.

interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest, as the builder of a part of it? Was the defendant's undertaking to go and build and deliver such a house as the contract called for, even if he should be obliged again and again to begin anew on account of the repeated destruction of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff himself was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. *Howell v. Coupland*, 1 Q. B. D. 258.

It seems very clear that, after the building was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone-work, brick-work, painting, and plumbing for another house of the same kind. The plaintiff might have answered, "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident, just before its completion, he was not

bound to build another, or to do anything further under his contract.¹ If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. (The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence.) Neither can recover anything of the other under the contract, for neither has performed the contract so that its stipulations can be availed of. The case of *Cook v. McCabe*, 53 Wis. 250, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. *Clark v. Franklin*, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute upon the authorities. The decisions in England differ from those of Massachusetts, and of most of the other States of this country. (There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract.) In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. *Allison v. Bristol Ins. Co.*, 1 App. Cas. 209, 226; *Byrne v. Schiller*, L. R. 6 Ex. 319. (In the United States and in continental Europe the rule is different.) *Griggs v. Austin*, 3 Pick. 20, 22; *Brown v. Harris*, 2 Gray, 359. (In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing; and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money.) *Appleby v. Myers*, L. R. 2 C. P. 651; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271.² One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction.

¹ But see *Chapman v. Beltz Co.*, 48 W. Va. 1. See also *Weis v. Devlin*, 67 Tex. 507.

² See also *Brumby v. Scott*, 3 Ala. 123; *Clark v. Collier*, 100 Cal. 256; *Siegel v. Eaton & Prince Co.*, 165 Ill. 550; *Huyett Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233; *Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262; *Pike Electric Co. v. Richardson Drug Co.*, 42 Mo. App. 272; *Murphy v. Forget*, Rap. Jud. Quebec 19 C. S. 135.

Whincup v. Hughes, L. R. 6 C. P. 78. (But where one dies and leaves unperformed a contract which is entire, his administrator may recover any instalments which were due on it before his death) Stubbs v. Holywell Railway, L. R. 2 Ex. 311.

[In this country, where one is to make repairs on a house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished.] In Cleary v. Sohler, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by a fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. [He sued on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover.] See also Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514, 517. In Cook v. McCabe, *ubi supra*, the plaintiff recovered *pro rata* under his contract; that is, as we understand, he recovered on an implied assumpsit at the contract rate. In Hollis v. Chapman, 36 Texas, 1, and in Clark v. Franklin, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are Schwartz v. Saunders, 46 Ill. 18; Rawson v. Clark, 70 Ill. 656; and Clark v. Busse, 82 Ill. 515. The same principle is applied to different facts in Jones v. Judd, 4 Comst. 411, and in Hargrave v. Conroy, 4 C. E. Green, 281. If the owner in such a case has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable.¹ [Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be

¹ Angus v. Scully, 176 Mass. 357; Haynes v. Second Baptist Church, 88 Mo. 285 (compare Fairbanks v. Richardson Drug Co., 42 Mo. App. 262; Pike Electric Co. v. Richardson Drug Co., 42 Mo. App. 272); Niblo v. Binsse, 1 Keyes, 476; Whelan v. Ansonia Clock Co., 97 N. Y. 293; Dolan v. Rogers, 149 N. Y. 489, 494; Hayes v. Gross, 9 N. Y. App. Div. 12 (aff'd without opinion, 162 N. Y. 610); Weis v. Devlin, 67 Tex. 507, *acc.*

See also Bentley v. State, 73 Wis. 416.

performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. [If the payments are to be treated merely as advancements on account of a single entire consideration, namely, the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy available in this suit is by a declaration in set-off.] If, on the other hand, each instalment due was a separate consideration for the payment made at the time, then as to those instalments and the payments of them the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid.

We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The \$38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins.

According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the Superior Court deems reasonable.

Verdict set aside.

Hickman & Co.

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GILBERT R. SPALDING ET AL., APPELLANTS, v. CARL ROSA
ET AL., RESPONDENTS.

NEW YORK COURT OF APPEALS, SEPTEMBER 26 — OCTOBER 2,
1877.

[Reported in 71 *New York*, 40.]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendants, entered upon an order overruling exceptions and directing a judgment upon an order on trial dismissing plaintiffs' complaint.)

This action was brought by plaintiffs, who were the owners and managers of the Olympic Theatre in St. Louis, to recover damages for an alleged breach of contract by defendants. By the contract defendants agreed to furnish the Wachtel Opera Troupe to give four performances per week at plaintiffs' theatre for two weeks, commencing the 26th or 27th February, 1872, plaintiffs to receive twenty per cent of the gross receipts, up to \$1,800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. (Defendants in consequence did not furnish the troupe at the time specified.)

Further facts appear in the opinion.

The court at the close of the evidence directed a dismissal of the complaint, to which plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

P. Cantine, for appellants.

Erastus Cooke, for respondents.

ALLEN, J. The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the Wachtel Opera Troupe, at the plaintiffs' theatre in St. Louis.

The Wachtel Opera Troupe was well known by its name as the company, at the time of making the contract, performing in operas, under temporary engagements, at the principal theatres and opera houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there was a troupe or company known by that name was competent as showing what particular company was in the minds of the contracting parties, and intended, by the terms used; and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country, as well as in Europe, as a tenor singer of superior excellence, and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity and capabilities as a singer upon which they relied to fill their theatre and reimburse themselves for their expenses and make a profit. The appearance of Wachtel in the operas was the principal thing contracted for, and the presence of the others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the Wachtel Opera Troupe contracted for without him. There is no dispute as to the facts. The only question is one of law as to the effect of the sickness, and consequent inability of Wachtel to fulfil the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone, as if he was the sole performer contracted for. This follows from the conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not in their nature of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. *People v. Manning*, 8 Cow. 297; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 N. Y. 279; *Wolfe v. Howes*, 24 Barb. 174, 666; 20 N. Y. 197; *Gray v. Murray*,

3 J. C. R. 167; Robinson v. Davison, L. R. 6 Ex. 268; Boast v. Firth, L. R. 4 C. P. 1. The same principle was applied in Dexter v. Norton, 47 N. Y. 62, and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed.

All concur, except Folger, J., absent.

Judgment affirmed.

THOMAS LACY v. SOPHRONIA A. GETMAN.

NEW YORK COURT OF APPEALS, DECEMBER 19, 1889. — JANUARY 14, 1890.

[Reported in 119 New York, 109.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Elon R. Brown, for appellant.

W. A. Nims, for respondent.

FINCH, J. The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. [When, therefore, it is said, generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication.] (That limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service

¹ Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davison, L. R. 6 Ex. 269; Baxter v. Billings, 83 Fed. Rep. 790; Schultz v. Johnson's Adm., 5 B. Mon. 497; Marvel v. Phillips, 162 Mass. 399; Siler v. Gray, 86 N. C. 566; Dickinson v. Calahan, 19 Pa. 227; Blakely v. Sousa, 197 Pa. 305; Yerrington v. Greene, 7 R. L. 589; Landa v. Shook, 87 Tex. 608; Hubbard v. Belden, 27 Vt. 645; Green v. Gilbert, 21 Wis. 395, acc. Compare Jennings v. Lyons, 39 Wis. 553. See also the following cases of contracts to marry: Hall v. Wright, 3 E. B. & E. 746; Vierling v. Bender, 113 Iowa, 337; Shackleford v. Hamilton, 93 Ky. 80; Gardner v. Arnett, 50 S. W. Rep. (Ky.) 840; Goddard v. Westcott, 82 Mich. 180; Trammell v. Vaughan (Mo.), 59 S. W. Rep. 79; Allen v. Baker, 86 N. C. 91; Gring v. Lerch, 112 Pa. 244; Sanders v. Coleman, 97 Va. 690.

employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements.

The agitation of that question has kept the present case passing like a shuttle between the trial and the appellate courts, until it has been tried four times at the circuit and reviewed four times at General Term, and at last has been sent here in the hope of securing a final repose.

The facts are few and undisputed on this appeal. (The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work for a period of one year at a compensation of two hundred dollars. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever in the house and on the farm, during the term of her natural life. Lacy knew in a general way the terms of the will. He testifies that he knew that it gave to the widow the use of the farm, and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work under the direction of the widow until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.)

It is obvious at once that an element has come into the case as now presented, which was not there when the General Term first held that the contract survived. (It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm or personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service and could derive no possible benefit from it.) [The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except possibly upon proof of the consent of the widow.]

We have, then, the peculiar case of a contract made to work for McMahan and under his direction and control, which could not be performed because of his death (transmuted into a contract to work for Mrs. Getman upon a farm which she did not possess and had no right to enter; and performed by working for the widow and under her direction and control alone; and this because of the supposed rule that the contract survived the death of the master and remained binding upon his personal representatives.

It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will; and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts. There is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except possibly some corn on the ground valued at eighteen dollars. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled, and which, if sold to pay possible debts, would have left the servant without means of doing his work and with nothing to do, unless for the widow. So that the bald question is presented whether the contract survived the testator's death and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. Wolfe v. Howes, 20 N. Y. 197; Spaulding v. Rosa, 71 id. 40; Devlin v. Mayor, etc., 63 id. 14; Fahy v. North, 19 Barb. 341; Clark v. Gilbert, 32 id. 576; Seymour v. Cagger, 13 Hun, 29; Boast v. Firth, L. R. 4 C. P. 1. Almost all of these cases were marked by the circumstance that the services belonged to the class of skilled labor.

In such instances the impossibility of a substituted service by the representative of the servant is very apparent. (The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want.) While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. Fahy v. North was a contract for farm labor, ended by the sickness of the servant; and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform; it is without the servant's fault; and so further performance is excused and the contract is apportioned. (If in this case, Lacy had died on that day in July, his representative could not have performed his contract.) (McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved.) I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render

personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For, even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year; but Lacy's personal representative, or a laborer tendered by him, he might not want at all, and at least not for a fixed period, preventing a discharge. (And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract.) *Babcock v. Goodrich*, 3 How. Pr. (N. S.) 53.

But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not every one to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law; and a breach of this promise in a material matter justifies the master in discharging him. *King v. St. John, Devizes*, 9 B. & C. 896. One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties; and the rule applicable to one should be the rule which governs the other.

If now, to such a case, — that is, to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other — we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and any one may do that. But under the contract, that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new

master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far, from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

*Judgment reversed.*¹

PETER C. LAKEMAN v. JOSEPH W. POLLARD.

MAINE SUPREME COURT, 1857.

[Reported in 48 Maine, 463.]

HATHAWAY, J. The plaintiff labored for the defendants at their mills in St. Johns, and by this action claims to recover his wages.

The defence is, that the labor was performed under a contract, on his part, to work for the defendants during the sawing season of 1854, which he did not fulfil.

The testimony of Bagley, Nute, and Stone that "they were not hired by the season, but only to remain there as long as they pleased," could have no legitimate effect upon the rights of the parties in this suit, and was improperly admitted. That testimony was introduced by the plaintiff as tending to show that he was not hired for a specified time. But the jury found that he was so hired. Else they could not have found, as they did, specially, that "he quit the defendants' employ, without their leave or consent, before the expiration of the time for which he was hired." The defendants were not aggrieved by the admission of that testimony, for the special findings of the jury show that it produced no effect.

The plaintiff contends that he was excused from the performance of

¹ Farrow v. Wilson, L. R. 4 C. P. 744; Whincup v. Hughes, L. R. 6 C. P. 78; Harris v. Johnson, 98 Ga. 434; Weedon v. Waterhouse, 10 Hawaii, 696; Yerrington v. Greene, 7 R. I. 589, acc. Compare Volk v. Stowell, 98 Wis. 385.

The death of one member of a partnership is generally held to dissolve a contract of employment made with the firm. Tasker v. Shepherd, 6 H. & N. 575; Cowasjee Nanabhoy v. Lallbhoy Vullabhoy, 3 Ind. App. 200; Brace v. Calder, [1895] 2 Q. B. 253; Hoey v. McEwan, 5 Sess. Cas., 3d Ser. 814; Griggs v. Swift, 82 Ga. 392; Greenburg v. Early, 30 Abb. N. C. 300, 303. But see Phillips v. Alhambra Palace Co., [1901] 1 Q. B. 59; Hughes v. Gross, 166 Mass. 61; Nickerson v. Russell, 172 Mass. 524; Ferreira v. Sayres, 5 W. & S. 210.

The Louisiana Civil Code, Art. 2007, provides that "all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee." See Tete v. Lanoux, 45 La. Ann. 1343.

his contract, and justified in quitting when he did, by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfilment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. (If he was prevented by sickness or similar inability he may recover for what he did, on a *quantum meruit*.) 1 Parsons on Contracts, 524.

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it; nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not *then* have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must, necessarily, have acted at his peril, under the guidance of his judgment.

The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as *then* existing. (When the laborer has adequate cause to justify an omission to fulfil his contract, such omission cannot be regarded as his fault.) Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury, upon the evidence.

Where there are conflicting proofs, or some necessary facts are to be inferred from others which are proved, then it is the province of the jury to decide the cause, under instructions from the judge, as to the principles of law which should govern them." Sherwood v. Maverick, 5 Me. R. 295.

The question was rightly submitted to the jury, and with appropriate instructions.

No question is presented by the exceptions concerning the rulings of the court upon the subject of damages, or the amount, if any, recoverable for wages.

A report of the whole evidence, signed by the presiding judge, as the law requires, has not been furnished to the court. Therefore the motion for a new trial cannot be entertained.

Exceptions and motion overruled.

Judgment on the verdict.

TENNEY, C. J., and APPLETON, J., concurred.

GOODENOW, J., concurred in the result only.

MAY, J., concurred, remarking that the testimony of Bagley, Nute, and Stone was admitted as contradictory of other witnesses introduced by the defendant, and not upon the main question; and for such purpose was clearly admissible.¹

¹ Walsh v. Fisher, 102 Wis. 172, acc. As to an employer's liability on *quantum meruit* for the services rendered by an employee who becomes ill or dies before completion. — 21

FRANKLIN S. DEWEY v. THE UNION SCHOOL DISTRICT
OF THE CITY OF ALPENA.

MICHIGAN SUPREME COURT, APRIL 23 — APRIL 30, 1880.

[Reported in 43 Michigan, 480.]

GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months for \$130 per month. He entered on his duties on the 2d of September, and continued up to the 10th of December, at which time the district officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed thereafter for the same reason until the 17th of March. They were then reopened and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased \$100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: first, that on the second hiring it was mutually agreed that the addition of \$100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and, second, that the suspension was the effect of an overruling necessity, or, in other words, the act of God, and that all parts of the contract were suspended for the time being.

The circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into; or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life.

The jury returned a verdict in favor of the district. But we cannot know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both; and of course if one only was so decided, it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still, if no other ground of defence had been laid, the verdict must have been conclusive; as just explained, it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient, but the defence interposed cannot rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encoun-

pleting performance, see *Ryan v. Dayton*, 25 Conn. 188; *Coe v. Smith*, 4 Ind. 79; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Wolfe v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Parker v. Macomber*, 17 R. I. 674; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, 27 Vt. 759; *Green v. Gilbert*, 21 Wis. 395.

tered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. [The contract between the parties was positive and for lawful objects.] On one side school buildings and pupils were to be provided, and on the other personal service as teacher. [The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff.] Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. [It was the misfortune of the district, and the district and not the plaintiff ought to bear it.]

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity, (but of strong expediency) [To let in the defence that the suspension precluded recovery, the agreement must have provided for it.] But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition.]

The judgment must be reversed, with costs, and a new trial granted. The other justices concurred.¹

TURNER v. GOLDSMITH.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, JANUARY
23, 1891.

[Reported in [1891] 1 Queen's Bench, 544.]

LINDLEY, L. J. This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened. [The plaintiff wished to act as traveller to the defendant, and the defendant wished to engage him in that capacity.] An agreement, dated Jan. 31, 1887, was entered into between them, which contained this recital: "Whereas, in consideration of the agreement of the said A. S. Turner, the said company" (i. e., Mr. Goldsmith, and any partner he might have) "agree to employ the said A. S. Turner as their agent, canvasser, and traveller, upon the terms and subject to the stipulations of the condi-

¹ Gear v. Gray, 10 Ind. App. 428, acc.; Stewart v. Loring, 5 Allen, 306, contra. See also Ellis v. Midland Ry. Co., 7 Ont. App. 464; Libby v. Douglas, 175 Mass. 128, and cases cited.

tions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveller, upon the terms and subject to the stipulations and conditions hereinafter contained." (Stopping there, we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company — and on what terms.) (1) That the agency shall commence as from Jan. 31, 1887, and shall be determinable either by the company or Turner at the end of five years from the date of the agreement upon giving such notice as therein mentioned.) (2) "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list price to good and substantial customers." Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.)

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission.) [The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent.) Then it was said that there is no undertaking by the company to go on manufacturing. (It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it.) The plaintiff then says, "I am entitled to damages for your breach of the agreement to employ me for five years." The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How, then, can such a condition as the defendant contends for be implied?

It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes v. Forwood*, 1 App. Cas. 256, it was held that an action very similar to the present was not maintainable. (But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied.) In the present case we find an express contract to employ him.

In *Cowasjee Nanabhoj v. Lalbhoy Vullubhoj*, L. R. 3 Ind. App. 200, there was a contract in a partnership deed to employ one of

the partners during his life as sole agent to effect purchases and sales on behalf of the partnership, at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership; that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

Taylor v. Caldwell, 3 B. & S. 826, 833, contains some observations which are very much in point. Blackburn, J. there says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." [The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable.]

The plaintiff, then, is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that 125*l.* is too much, and the plaintiff's counsel having agreed to take our assessment of damages rather than be sent to a new trial, we assess them at 50*l.*, and direct judgment to be entered for the plaintiff for that amount.¹

¹ KAY, L. J., delivered a concurring opinion, and LOPES, L. J., also concurred in the decision.

Madden v. Jacobs, 52 La. Ann. 2107, acc.

PEOPLE OF THE STATE OF NEW YORK *v.* THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.NEW YORK COURT OF APPEALS, DECEMBER 12, 1882 —
JANUARY 23, 1883.[Reported in 91 *New York*, 174.]

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 1, 1882, which affirmed an order of Special Term dismissing a claim presented by James C. Mix upon the fund in the hands of the receiver of the defendant.

The facts were stipulated substantially as follows: —

Defendant was a registered policy life insurance company, organized under chapter 902, Laws of 1869. In December, 1876, said Mix entered into its employment as general agent, under a contract by which he was to receive a specified annual salary for a term of not less than five years. In May, 1879, the superintendent of the insurance department made the certificate provided for by section 7 of said act, and delivered it to the attorney-general, who thereupon commenced this action and obtained an order therein restraining defendant, its officers, etc., from the further prosecution of its business or the exercise of any of its corporate franchises. A receiver of the corporation was duly appointed and it was dissolved. Mix continued in the discharge of his duties under the contract until June 15, 1879, when he was notified by the receiver of his appointment, and of the dissolution of the company.

Edward C. James, for appellant.

Geo. W. Wingate, for receiver.

John C. Keeler, for attorney-general.

FINCH, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. (It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. (The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. *Shaw v. Republic Life*

Ins. Co., 69 N. Y. 286, 292; *James v. Burchell*, 82 id. 118. (He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor.) There could be neither readiness nor ability to do the forbidden and unlawful acts. *Jones v. Knowles*, 30 Me. 402. (So that, from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after.) What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. (The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation.) *People v. Security Life Ins. Co.*, 78 N. Y. 115. (Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other.) It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. (The contract in its own nature was dependent upon the continued life of both parties.) With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of *Mix* differs from that of the policy-holders. We held in the *Security* case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It antedated such dissolution, and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken and for that reason interfered; and when its decree of dissolution came it had to deal with broken contracts, and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. *Yelland's case*, L. R. 4 Eq. 350; *Clarke's case*, L. R. 7 Eq. 550; *Logan's case*, L. R. 9 Eq. 149; *Maclure's case*, L. R. 5 Ch. App. 787; *Dean & Gilbert's case*, L. J. 41 Ch. [N. S.] 476. In all of them the companies stopped payment before any intervention of the law, and this, being done by open and public notice, amounted to a voluntary refusal of performance.

and, therefore, a breach of contract, established before the winding up orders were made and the liquidators appointed. When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases is obviously different. *People v. National Trust Co.*, 82 N. Y. 283. They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words, such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not to be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that it resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it inter-

est-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution, since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the ship-owner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract was held to be dissolved (*Melville v. De Wolfe*, 4 E. & B. 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault; or that of the ship-owner, was held sufficient. Then, too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments, honestly and prudently made, would shrink beyond repair, and bring down a dissolution by the State. If, in such case, in some sense, such dissolution may be deemed the act of the company, in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. (As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a *vis major*, his own act, so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act, not at all the product of its own volition, and not a breach by it of its contracts previously unbroken.) Especially is this true as between the company and its own officers contracting with it. (One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law

upon the fulfilment of the law's conditions. [In the event of such corporate death the motive of the State, or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and, however it may have been provoked or induced, it must be deemed the act of the State, and not of the corporate body; and is the independent act of the State, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence.] That may follow, or may not follow. The superintendent of insurance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does it is his act, and not the company's; dependent wholly on his volition, and not on that of the corporation; an independent agency guided by its own motives and not the act of the company producing its own death.

[If it be asked where this doctrine leaves the policy-holders, and their claims for breach of contract, the answer is two-fold.] Where the dissolution follows an impaired reserve, their contracts, as we have already said, were broken by the company before the State interposed. But their rights go much deeper than that. For while in the Security case, we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. [If the State had dissolved this company while its contracts with the policy-holders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policy-holders on a different ground.] The assets to be distributed would be the reserve, or so much of it as remained. That reserve, as we showed in the Security case, is made up of the excess of premiums paid by the policy-holders in the earlier years of their policies beyond the real cost of insurance to enable them to be carried in later years when the risks should be greater. Practically, therefore, at the date of dissolution the reserve represents the earnings of the policies and the contributions of the policy-holders. And as, in the case of contracts for personal services dissolved without fault by death or the act of the law, the contract is apportioned, and the servant entitled to his actual earnings to the date of dissolution, so the policy-holders would be entitled to the just earnings of their policies to the same date, and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equitable ownership, which gives them a right beyond that of mere creditors seeking damages for a breach of contract. To make, and to carry out contracts of insurance is the very object of the corporation, and the sole purpose of and excuse for its existence. [The State gives it life for that end, and takes it away when the result is not reached.] It watches it during life to see that it fulfils the purpose for which it was created, and buries it when that purpose fails. And as in the creation of the company, and in its supervision and con-

trol the rights of the policy-holders and their safety are the paramount considerations, so they remain paramount when corporate death is inflicted.) The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a court of equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policy-holders in equity; and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and therefore no shadow of an equity against the assets, the policy-holders resisting his claim are protected by an equity not to be overlooked or disregarded.

Other considerations of very serious import were adverted to by the courts below, which we need not here discuss. What has been said sufficiently indicates our opinion that no error was committed in rejecting the claim of the general agent.

The order should be affirmed.

All concur.

Order affirmed.

CLARKSVILLE LAND CO. v. HARRIMAN.

NEW HAMPSHIRE SUPREME COURT, JULY 26, 1895.

[Reported in 44 Atlantic Reporter, 527.]

ASSUMPSIT by the Clarksville Land Company against Gilbert Harriman. Facts found by referee. Judgment for plaintiff.

Jason H. Dudley, for plaintiff. *Thomas F. Johnson* and *Henry W. Lund*, for defendant.

WALLACE, J. In the spring of 1881 the defendant had a large quantity of logs on the branches of Hall stream, a tributary of the Connecticut river, ready to be driven down the stream. At this time the plaintiffs entered into an agreement with him to drive the logs down the stream to the Connecticut river. Although it is not found in express terms that the contract was to be performed that spring, yet such appears to have been the understanding of the parties.

¹ *Malcolmson v. Wappoo Mills*, 88 Fed. Rep. 680; *Lenoir v. Linville Improvement Co.*, 126 N. C. 922, *acc.*; *Spader v. Mural Decoration Co.*, 47 N. J. Eq. 18; *Bolles v. Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614; *Rosenbaum v. United States Credit Co.*, 61 N. J. L. 543, *contra*.

If a corporation voluntarily winds up business it is liable for failing to fulfil its contracts. *Yelland's Case*, L. R. 4 Eq. 350; *Re London, &c. Co.*, L. R. 7 Eq. 550; *Re Dale*, 43 Ch. D. 235; *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264; *Kalkhoff v. Nelson*, 60 Minn. 284; *Tiffin Glass Co. v. Stoeher*, 54 Ohio St. 157; *Seipel v. Insurance Co.*, 84 Pa. 47; *Potts v. Rose Valley Mills*, 167 Pa. 310. See also *Ex parte Maclure*, L. R. 5 Ch. 737; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

Shortly afterwards, and before the plaintiffs had a reasonable time in which to complete their contract, notwithstanding the fact that they used due diligence, the water in the stream suddenly fell, and remained so low that the further performance of the contract that spring was rendered impossible. The question is whether this is an excuse for the non-performance of the contract on the part of the plaintiff. The plaintiffs did not undertake to transport the logs in any event, regardless of the way in which they should move them, whether by the stream or in some other way. They only undertook to transport them by driving them down the stream. If the parties contemplated the failure of the water in the stream, and contracted with reference to it, and it was agreed that the plaintiffs were to guaranty its sufficiency for driving the logs, then they were not excused from the performance of the contract by the failure of the water, and are answerable in damages. But if they contracted on the basis of the continued existence of sufficient water to transport the logs, and it was the understanding that the plaintiffs were only bound to drive them in case the water was adequate for that purpose, they were excused from the further performance of the contract. Taylor v. Caldwell, 3 Best & S. 826; The Tornado, 108 U. S. 842, 2 Sup. Ct. 746; Railway Co. v. Hoyt, 149 U. S. 1, 14, 13 Sup. Ct. 779; Dexter v. Norton, 47 N. Y. 62; Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514. It is a question of fact what the terms of the contract were. The referee does not find that the plaintiffs agreed to warrant the sufficiency of the water in the stream. It is so unreasonable and improbable to suppose that they would so contract that it will not be inferred from a mere finding that the plaintiffs agreed to drive the logs for the defendant that spring. The referee finds that emergencies arose to prevent the performance of the contract that cannot reasonably be supposed to have been contemplated by the plaintiffs, and which would not have been anticipated by a man of experience, and a practical river driver, when the contract was made. This shows that the parties did not contemplate the failure of the water in the stream, nor undertake to contract that the logs were to be driven in any event, or that the plaintiffs should warrant the sufficiency of the stream for that purpose, and be answerable in damages for its failure. The contract was made on the basis of the continued existence of sufficient water to render its performance possible. The plaintiffs, being without fault, and having exercised due diligence in the performance of their contract, were excused from its further performance by the failure of the water. Judgment on the report of the plaintiffs.

*All concurred.*¹

¹ "There are many cases holding that the continued existence of the means of performance, or of the subject-matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception, and, as said in Dexter v. Norton, 47 N. Y. 62, it operates 'to carry out the intention of the parties under most circumstances, and is more just than

ALBERT HERTER, RESPONDENT, v. JEREMIAH J. MULLEN
AND THOMAS MULLEN, APPELLANTS.

NEW YORK COURT OF APPEALS, MARCH 28—APRIL 18, 1899.

[Reported in 159 *New York*, 28.]

MARTIN, J. This action was to recover seven months' rent of a dwelling house situated upon Madison Avenue, in the city of New York. There was a lease between the parties by which the defendants rented the premises from May 1, 1894, for the period of one year, the rent payable in monthly instalments in advance. The rent for that term has been paid. By this action the plaintiff seeks to recover rent for a portion of the succeeding year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time.

The facts are undisputed. The defendants alleged as a defence to the action the making of the contract or lease with the plaintiff; that in the month of February, 1895, before the expiration of their term, they notified the plaintiff that they would not retain the premises for another year, and that after such notice the plaintiff and his agents were permitted to show the premises and to place the usual notice "To Let" upon them, which remained during the balance of the term. The defendants then specially alleged that on May 1, 1895, the defendants were prevented from yielding up the possession of the premises by the act of God in afflicting their mother, who was a member of their family, with a disease which, at that time, previously, and subsequently including May fifteenth, confined her to her bed so that it would have endangered her life to take her from the house; that for that reason and no other, of which the plaintiff had full knowledge and notice, the defendants were obliged to and did occupy a small portion of the premises until May fifteenth; that all their property, furniture, and belongings and their family were removed from the premises, and every part thereof on May 1, 1895, except from the sick-room in which their mother was confined, and that they were forbidden by the physician in charge to remove her until May fifteenth, when she was at once removed.

Upon the trial it was admitted that upon the first of February, 1895, the defendant notified the plaintiff that on the first of May they would give up and surrender the possession of the premises. That they were occupied under the lease was admitted, also the rate of rent, and the fact that the defendants from necessity held over after the expiration

the contrary rule." *Dolan v. Rodgers*, 149 N. Y. 489, 493. Compare *Ashmore v. Cox*, [1899] 1 Q. B. 436; *Robson v. Mississippi Logging Co.*, 61 Fed. Rep. 893; *Keystone Lumber, &c. Co. v. Dole*, 43 Mich. 370; *Shear v. Wright*, 60 Mich. 159; *Eppens v. Littlejohn*, 164 N. Y. 187; *Ellis v. Midland Ry. Co.*, 7 Ont. App. 464.

of the lease some fifteen days. [The plaintiff then admitted the facts set up in the answer as to the impossibility of the defendants' surrendering possession at the expiration of the year, so that the question presented is whether, notwithstanding the facts alleged in the answer, the plaintiff was entitled as a matter of law to recover rent for the succeeding year, upon the ground that the defendants held over after the expiration of their term.]

The admission of the plaintiff amounts to a concession that by reason of the sickness of the defendants' mother it was impossible for them to surrender up the possession of the premises to the plaintiff; that so far as it was possible they did so; and, hence, that their retention was wholly involuntary. [If there was any doubt as to the question of impossibility, it should have been submitted to the jury, and the defendants' exception to the direction of a verdict was well taken. Thus, in a word, the question is whether that impossibility justified the defendants' action, or whether, although it was impossible to surrender the entire premises, the holding of a small part for a few days imposed upon them a liability for rent for the succeeding year.]

[It is well settled that where a tenant voluntarily holds over after the expiration of his term, he may be held as upon an agreement to hold for a year upon the terms of the prior lease.] *Conway v. Starkweather*, 1 Denio, 114; *Commissioners of Pilots v. Clark*, 33 N. Y. 251; *Haynes v. Aldrich*, 133 N. Y. 287, 289.

The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

It is also well settled that where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused. [but where a person absolutely and by express contract binds himself to do a particular thing which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party.] The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God. *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272; *Dexter v. Norton*, 47 N. Y. 62.

Thus the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease, is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of duty and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law and not by an express or absolute agreement, it falls within the first part of the foregoing rule,

and, hence, it is obvious that if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law.

The reason for the distinction between the effect of impossibility of performance, occasioned by inevitable accident or the act of God, upon an obligation created by express contract, and upon an obligation which the law implies, has been held to rest "upon the unwillingness of the law to at once create, impose, and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence." *School District v. Dauchy*, 25 Conn. 530. Under the principle of the authorities relating to this subject, I think it is clear that, as the obligation sought to be enforced was one created by law and not by the agreement of the parties, impossibility of performance was a valid excuse, and the defendants cannot be held for the rent for the subsequent year.

Moreover, the same result may be reached upon another ground. There are many cases where the courts have implied a condition in a contract to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible. The principle upon which those cases are based is that, when the contract was made, the parties contemplated that the condition which subsequently existed might arise and render performance impossible, and that the implied condition is to be construed as a part of the existing contract, and thus relieves the party from liability in case that condition arises. *Dexter v. Norton*, 47 N. Y. 62; *Lorillard v. Clyde*, 142 N. Y. 456, 462; *Stewart v. Stone*, 127 N. Y. 507; *Spalding v. Rosa*, 71 N. Y. 40, 44; *Taylor v. Caldwell*, 3 Best & S. 826; *Robinson v. Davison*, L. R. [6 Ex.] 269; *Kein v. Tupper*, 52 N. Y. 550, 555; *Dolan v. Rodgers*, 149 N. Y. 489, 492.

To hold in this case that this agreement was made upon an implied condition that the defendants should not be required to vacate the premises at the expiration of their term in the event that it was rendered impossible by inevitable accident or the act of God is quite within the principle of the authorities cited. But, be this as it may, it is manifest that the charge or liability which the plaintiff seeks to enforce was created by law and not by agreement, and that as its performance was prevented without the defendants' fault, they were excused from the onerous liability which the plaintiff now seeks to enforce.

It may well be, and doubtless is, true that the plaintiff may recover for the time the premises were occupied by the defendants, or if by reason of their failure to surrender up the premises additional damages follow, that they may be recovered in a proper action so that all damages caused by the defendants' misfortune would be borne by them, but that he cannot recover the rent for the subsequent year upon the implied contract or duty imposed by law, seems to me clear.

... as a contract imposed by law is not subject to agreement or condition.

These considerations lead me to the conclusion that the judgment in this action should be reversed and a new trial ordered, with costs to abide the event.¹ *These are the citations for future reference of parties in case of a rehearing - 2 on the other!*

EMPIRE TRANSPORTATION CO. v. PHILADELPHIA &
READING COAL & IRON CO.

CIRCUIT COURT OF APPEALS FOR THE EIGHTH COURT, AUGUST 24, 1896.

[Reported in 77 Federal Reporter, 919.]

APPEALS from the District Court of the United States for the district of Minnesota.

These are appeals from decrees dismissing libels against the appellee, the Philadelphia & Reading Coal & Iron Company, for damages for the detention of vessels during the strike of 1894. Each of the appellants filed a libel against the appellee in the court below to recover damages for the detention of one of its steamships for a period of 12 days during that strike. The appellant the Empire Transportation Company alleged, in its libel, that on June 30, 1894, the appellee chartered its steamship, the W. H. Gilbert, to transport a cargo of coal owned by the appellee from Buffalo, in the State of New York, to West Superior, in the State of Wisconsin; that the ship arrived at West Superior, loaded, on July 4, 1894; that the appellee commenced to unload her on the next day, but ceased on that day, before she was unloaded, and did not complete the unloading, or discharge her, until July 17, 1894; that the usual and sufficient time to discharge such a cargo, at the docks of West Superior, was 2 days; that she was detained 12 days longer than was necessary or reasonably required for her discharge; and that the damage to the libellant was \$200 per day. The appellant the Mitchell Steamship Company alleged, in its libel, that the appellee chartered its steamship, the W. H. Gratwick No. 2, for the same purpose, on July 6, 1894, that the vessel arrived at West Superior with its load on July 10, and that it was detained until July 24, 1894, before it was unloaded. In other respects it made the same allegations as were made by the Empire Transportation Company. The contracts of affreightment of the two vessels were identical in terms, and were attached to the libels. (They were simple bills of lading, which contained no stipulation of any kind with reference to the time of unloading or discharging the vessels, but merely provided that the owners of the steamships should deliver the coal at West Superior, in good condition, upon the payment by the appellee of 25

¹ O'BRIEN, J., also delivered an opinion for reversal and PARKER, C. J. and HAIGHT, J., concurred. GRAY, J., delivered an opinion for affirmance, and BASTLETT and VANK, JJ., concurred.

cents per net ton, free of handling.) The answers of the appellee to these libels were that, without any fault or negligence on its part, its employes struck, and refused to work, on July 6, 1894, without any previous warning of their intention so to do; that the appellee immediately hired other workmen to take their places, and used reasonable diligence to reorganize its working force, and to unload these vessels; but that the strikers organized into a body, and by violence and intimidation prevented some of the men it hired from working for it, scared away others after they commenced to work, and rendered the appellee powerless to discharge the steamships sooner than it did. The Court below held that these allegations were true, that they constituted a good defence to the libels under the law, and entitled the appellee to decrees of dismissal. Such decrees were accordingly entered, and are now presented to this Court for review.]

Herbert R. Spencer, for appellants.

M. H. Boutelle, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.¹

In the absence of any stipulation with reference to the time of unloading or discharge in a charter of a vessel, is the charterer liable to the owner of the ship for damages for her detention caused by a strike of his laborers and such subsequent intimidation and violence on their part as prevent other willing workmen from supplying their places? If so, is the finding of the Court below, that the appellee used reasonable diligence to discharge these vessels, but was delayed without its fault by the intimidation and violence of the strikers, warranted by the evidence in these cases? These are the questions presented by these appeals.

Demurrage, strictly speaking, can be recovered only when it is expressly reserved by the charter or bill of lading. *Gage v. Morse*, 12 Allen, 410; *The J. E. Owen*, 54 Fed. 185, 186. But one who charters a vessel, under a contract that is silent as to the time of unloading and discharge, contracts by implication that he will unload and discharge her within a reasonable time or with reasonable diligence. *Cross v. Beard*, 26 N. Y. 85, 89; *Fulton v. Blake*, 9 Fed. Cas. 993, 995 (No. 5,153); *The J. E. Owen*, 54 Fed. 185; *Burrill v. Crossman*, 16 C. C. A. 381, 69 Fed. 747; *The M. S. Bacon v. Erie & W. Transp. Co.*, 3 Fed. 344; *Whitehouse v. Halstead*, 90 Ill. 95, 98; *Henley v. Ice Co.*, 14 Blatchf. 522, Fed. Cas. No. 6,364; *Finney v. Railway Co.*, 14 Fed. 171; *Houge v. Woodruff*, 19 Fed. 136; *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. 201; *Gronn v. Woodruff*, 19 Fed. 143; *The Z. L. Adams*, 26 Fed. 655, 656; *The Elida*, 31 Fed. 420; *The William Marshall*, 29 Fed. 328; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. 254; *Riley v. A Cargo of Iron Pipes*, 40 Fed. 605; *Bellatty v. Curtis*, 41 Fed. 479, 480; *Taylor v. Railway Co.*,

¹ A portion of the opinions in which some of the facts are discussed is omitted.

L. R. 1 C. P. 385; *Burmester v. Hodgson*, 2 Camp. 488; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, L. R. 5 Q. B. 544; *Hick v. Rodocanachi*, [1891] 2 Q. B. 628, 638, 638, 646; *Raymond*, [1891] 1 Reports, 125, 129, 133, 134; *Postlethwaite v. Freeland*, 5 App. Cas. 599, 621, 622. These libels seek damages for the breach of this implied contract. [Where the time for the discharge of the vessel is stipulated, or is definitely fixed by the charter or bill of lading, so that it can be calculated beforehand, the charterer thereby agrees absolutely to discharge her within that time, and he takes the risk of all unforeseen circumstances. "He bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge (*Randall v. Lynch*, 2 Camp. 352); or from frost (*Barret v. Dutton*, 4 Camp. 338), or bad weather (*Thiis v. Byers*, 1 Q. B. Div. 244), preventing access to the vessel; or from acts of the government of the place prohibiting export, or preventing communication with the ship (*Barker v. Hodgson*, 3 Maule & S. 267; *Bright v. Page*, 3 Bos. & P. 295, note). And it is immaterial that the ship-owner, also, is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk." Carv. Carr. by Sea, §§ 610, 611; *Davis v. Wallace*, 7 Fed. Cas. 182 (No. 3,657); *Railroad Co. v. Northam*, 19 Fed. Cas. 492 (No. 11,090); *Williams v. Theobald*, 15 Fed. 465, 471; *Manson v. Railroad Co.*, 31 Fed. 297; *Sixteen Hundred Tons of Nitrate of Soda v. McLeod*, 10 C. C. A. 115, 61 Fed. 849; *Burrill v. Crossman*, 16 C. C. A. 381, 69 Fed. 747, 752.]

Over the principles of law which we have stated there is no dispute. [The controversy is over the effect, upon the contracts in these cases, of the established fact that the customary time for the discharge of a cargo of coal at the port of West Superior was two days.] It was conceded that, in the absence of proof of this customary time of discharge at that port, these contracts must fall under the first class of cases to which we have adverted, and that the only question would be whether or not the appellee discharged the vessels within a reasonable time, under all the circumstances of the case. The contention of counsel for the appellants is that the fact that such vessels were customarily discharged at that port in two days removes these cases from the first, and ranges them in the second, class of cases, to which we have referred. [The position is, in effect, that proof of the customary time of discharge excludes from the consideration of the court every other fact and circumstance bearing upon the reasonableness of the time of the discharge of these vessels, and upon the reasonableness of the diligence of the appellee, and converts these contracts from agreements to unload the ships with reasonable diligence into absolute obligations of the appellee to discharge the vessels in two days, regardless of every unforeseen chance and circumstance.] The argument is: One who contracts to unload a vessel within a fixed time takes the risk of all unforeseen circumstances. The custom of the port of delivery is by implication a part of every contract of affreightment. Therefore, one

who makes a contract for the service of a vessel, which is silent as to the time of her discharge, enters into an absolute obligation to discharge her within the customary time at her port of delivery, and takes the risk of every unforeseen obstacle and accident. Is it, however, true, that the custom of the port becomes by implication a part of such a contract, any more than every other fact and circumstance does which directly bears upon the reasonableness of the diligence of charterer? The customary time for the discharge of vessels at any port is necessarily the time within which they are discharged under ordinary circumstances. Given the ordinary circumstances, and the customary time becomes the reasonable time, and, in that way, the key to the construction of the contract. Under such circumstances, — that is, under ordinary circumstances, — where the consignee, by the exercise of reasonable diligence, might discharge the vessel in the customary time, he has been properly held liable for detention beyond that time; and Courts, in discussing such cases, have sometimes said that there was an implied agreement in the contract that the charterer would not delay the boat beyond the usual time of discharge in the port of delivery. On the other hand, where long delay has resulted from compliance with the custom of a port for vessels to take their turns at a dock, and the consignee could not, with reasonable diligence, have avoided this delay, the Courts have often held that he was not liable therefor.

The cases relied upon by counsel for the appellants belong to one or the other of these classes. *Higgins v. Steamship Co.*, 3 Blatchf. 282, 284, Fed. Cas. No. 6,469, illustrates the former class. The custom of the port was for boats to unload in turn. There were no extraordinary circumstances suspending the operation of the custom. The turn of libellant's boat came, and the consignee delayed it until another boat, over which it had the preference, had been brought to the dock and unloaded. The defendant was held liable for this delay. To the same effect are *Whitehouse v. Halstead*, 90 Ill. 95, 100; *The Nether Holme*, 50 Fed. 434; *The Z. L. Adams*, 26 Fed. 655. *Burmester v. Hodgson*, 2 Camp. 488, is an illustration of the other class of cases. In that case a ship was delayed 63 days, on account of the crowded condition of the docks, before it could get its turn. The custom of the port, however, was for vessels to take their turns in unloading. The Court held that the extraordinary circumstance of the overcrowded condition of the docks excused the consignee from unloading within the time required under ordinary circumstances, and that he was not liable for the detention of the vessel until it could be unloaded in its turn. To the same effect are *The Glover*, 10 Fed. Cas. 501 (No. 5,488); *Bellatty v. Curtis*, 41 Fed. 479; *The J. E. Owen*, 54 Fed. 185; *Bartlett v. A Cargo of Lumber*, 41 Fed. 890; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. 254, 255; *The M. S. Bacon v. Erie & W. Transp. Co.*, 3 Fed. 344; *Gronn v. Woodruff*, 19 Fed. 143; *The Elida*, 31 Fed. 420; *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. 201.

Every one of the cases last cited proves, upon careful examination, to be an authority against the appellant. It is clear that in each of them more than the customary or usual time was taken to discharge the vessel, but in each the Court considered the extraordinary circumstance that the port was overcrowded with vessels, and the custom of taking turns, and held that, in view of all the facts and circumstances, the charterer or consignee was excused for the delay, because the time used for unloading was reasonable, although it was longer than the customary time under ordinary circumstances. (We have failed to find any decision among the cases cited by counsel for the appellants to the effect that the custom of a port excludes other facts and circumstances from consideration in determining the reasonableness of the time of the boat's discharge or of the diligence of the charterer.) The decisions and opinions to which he referred amount to nothing more than this: that when a ship is to be unloaded, under ordinary circumstances, the customary method and the customary time in its port of delivery prove the reasonable method and the reasonable time, and measure the liability for detention, in the absence of countervailing evidence. [But, suppose that the circumstances are extraordinary; suppose that the threats of reckless men and the violence of mobs suspend the operation of every custom of a port, and hold willing laborers and anxious dock owners alike in enforced idleness and utter helplessness for days; as the customary time for the discharge of a vessel under ordinary circumstances the reasonable time under such circumstances? Shall the reasonableness of the time within which a charterer is required to unload a vessel under such circumstances be measured by a consideration of ordinary circumstances only, or by a consideration of all the actual facts and circumstances at the time he was required to unload her? This is the real question in these cases.

It is not a new question. It has been carefully and exhaustively considered in the English courts. In *Burmester v. Hodgson*, *supra*, Chief Justice Mansfield said that, in a case where no time was fixed by the contract, the law could only raise an implied promise to discharge the ship in the usual and customary time for unloading such a cargo. But his decision in that very case was that the extraordinary circumstance that the docks were overcrowded excused the consignee for a delay of 40 days beyond the customary time under ordinary circumstances. In *Ford v. Cotesworth*, L. R. 4 Q. B. 127, L. R. 5 Q. B. 544, the charter party provided that the cargo was to be delivered in the usual and customary manner, but nothing was said about time. The cargo could not be landed until 7 days beyond the customary time on account of a threat of bombardment. Lord Chief Justice Cockburn directed the jury that, the charter party being silent as to the time for unloading, there arose an implied contract on the part of the freighter to unload and discharge within a reasonable time, and that the question whether the time occupied was reasonable or unreasonable was to be judged with reference to the means and facilities available, and the

regulations and course of business at the port. The jury found that there was no unreasonable delay. The judgment on this finding was affirmed in both the Court of Queen's Bench and the Exchequer Chamber, on the ground that the reasonableness of the time occupied in unloading must be determined, not with reference to the ordinary, but with reference to the actual, circumstances which attended the unloading. These decisions were rendered, too, it will be noticed, in a case in which the charter party expressly stipulated that the delivery should be in the usual and customary manner. The general proposition, that, where no time is fixed for unloading, it is the charterer's duty to unload in the usual or customary time, was emphatically denied in this case by the Court of Queen's Bench (L. R. 4 Q. B. 127), and by Lord Blackburn in *Postlethwaite v. Freeland*, 5 App. Cas. 621. In the latter case, the charter party provided that "the cargo is to be discharged with all despatch according to the custom of the port." The ship was detained 35 days on account of the number of ships at the port of delivery awaiting discharge. Lord Blackburn said:

"In *Taylor v. Railway Co.*, L. R. 1 C. P. 385, it was laid down that a 'reasonable time' meant what was reasonable under all the circumstances. Byles, J., there says: 'My Brother Hayes treats "ordinary time" and "reasonable time" as meaning the same thing; but I think "reasonable time" means a reasonable time, looking at all the circumstances of the case. The delay in this case was an accident, so far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable.' This is, I think, right, and applicable to the present case."

In *Hick v. Rodocanachi*, L. R. 2 Q. B. 626, 633, 638, 646, the owner of a ship sued for damages for detention caused by a strike of dock laborers. The charter party was silent as to the time of unloading. The time occupied in actually unloading the ship was 6 days, but, after the consignees had proceeded with the work 3 days, they were interrupted, and prevented by the strike from continuing it, for 30 days. The trial court held the consignees liable for the delay, on the ground that their implied contract was to discharge in a reasonable time under ordinary circumstances. In 1891 the consignees presented this case to the Court of Appeals, and argued that the reasonableness of the time for unloading must be considered with reference to the actual facts and circumstances at the time of the unloading, and not in view of the ordinary circumstances only, and the customary time of unloading. The Court of Appeals reversed the judgment below, and so held. Its decision was subsequently reviewed and affirmed by the House of Lords in *Hick v. Raymond*, 1 Reports, 125, 129, 133, 134. Careful reviews of all the English authorities, and exhaustive discussions of this question upon principle, will be found in the opinions of the learned judges in this case at the pages of the report to which we have referred. We refrain from quotations. The decisions to which we have adverted put the question under consideration forever at rest in the English courts.

A careful examination of the decisions of many of the American courts has failed to convince us that they have ever taken a different view. In many of the opinions it is said that, where the charter is silent as to the time of unloading, the charterer or consignee is bound to discharge the vessel "in a reasonable time according to the custom of the port"; but when the decisions actually rendered in the cases in which these opinions were delivered are examined, it is plain that the learned judges who used this expression did not mean that the charterer was bound to discharge the vessel in the customary time, regardless of its reasonableness. All the American decisions show that, whether a custom of the port is proved or not, all the facts and circumstances, ordinary and extraordinary, which existed at the time of the unloading, have been uniformly considered in determining the reasonableness of the time of discharge. Thus, in the early case of *Cross v. Beard*, 26 N. Y. 85, decided in 1862, in which no customary time was proved, it was held that a storm on one of the lakes and an accidental break in a canal, which caused a fleet of vessels to come to a port together that would otherwise have come singly, and thereby delayed the discharge of plaintiff's vessel, would warrant the jury in finding that the consignees were without fault, and that they discharged the boat in a reasonable time. Judge DENIO said:

"In such cases the defendant is not charged for the payment of a sum pursuant to the terms of a contract, but for general damages for the breach of his implied agreement. This involves a greater or less degree of delinquency, and it would, therefore, be unreasonable to hold the defendant responsible, if he was able to show that it was in no respect his fault that there was a delay in loading or unloading the vessel."

In *Fulton v. Blake*, 5 Biss. 371, 9 Fed. Cas. 993 (No. 5,153), the proof was that the customary time for furnishing a vessel with a dock for unloading, at Chicago, was one day. The libellant's vessel was delayed five days. But Judge BLONGERR held that the fact that one of the defendant's docks had been injured by the great Chicago fire, and that an unusual number of vessels had arrived for the consignees at the same time, without their fault, relieved them from liability for the delay. He said:

"What should be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. . . . Admitting that, under ordinary circumstances, the respondent would have been bound to furnish the vessel with a dock within one day after notice, there were extraordinary circumstances, controlling all persons doing business in this city at that time, to such an extent, at least, as absolves respondents from the consequences of the delay charged in this libel."

These cases illustrate the current of the American decisions. They apply the same rules of law to these contracts when a customary time of discharge is proved that they do when no custom is established, and

the test of the liability of the charterer for the delay is the reasonableness of the time occupied in unloading, in view of all the existing facts and circumstances at that time. Any other rule would contradict and destroy itself. It is settled that the obligation of the charterer is to unload the ship in a reasonable time. Our reason teaches that the time that is reasonable under ordinary circumstances — that is, the customary time — is always unreasonable under extraordinary circumstances. If the extraordinary circumstances can never be considered to determine the reasonableness of the time, then the charterer must always unload all vessels that arrive under unusual circumstances in an unreasonable time. If there was authority for such a proposition, we should hesitate long before adopting it. We think there is none.

Our conclusions, founded, as we believe, upon reason, and supported, as we think, by the consensus of the opinions of the Courts of England and America, are :

1. Where the charter of a ship is silent as to the time of unloading and discharge, there is no implied agreement that the charterer will unload or discharge her in the customary time at the port of delivery, regardless of all extraordinary circumstances and unforeseen obstacles.

2. The implied contract is to unload and discharge her in such time as is reasonable, in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of her arrival and discharge.

3. This implied contract to discharge the vessel in a reasonable time is, in effect, a contract to discharge her with reasonable diligence.

4. The burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise reasonable diligence to discharge her, under the actual circumstances of the particular case.

5. Proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his reasonable diligence thereunder.

In support of these propositions, we refer to the authorities cited at the opening of this opinion, and to the following analogous cases, which have arisen upon claims against common carriers for damages for delays in transportation, caused by strikes and accidents, without their fault: *Geisner v. Railroad Co.*, 102 N. Y. 563, 571, 7 N. E. 828; *Railroad Co. v. Hazen*, 84 Ill. 36, 38; *Railway Co. v. Hollowell*, 65 Ind. 188, 195; *Railway Co. v. Levi*, 76 Tex. 337, 343, 13 S. W. 191.

The evidence amply sustains the finding of the Court below that the appellee exercised reasonable diligence in discharging this boat in the face of these unforeseen and extraordinary circumstances.

The suggestion that the Reading Company might have resumed operations earlier by hiring the men who had discharged themselves at the rate of 50 cents, instead of 40 cents, an hour, and by agreeing

not to prefer other workmen as employés, is not entitled to extended consideration. The market rate of wages for men of this class was 40 cents an hour. That was the rate at which the strikers worked without complaint until they abandoned their employment. That was the rate at which the new employés were paid. The exercise of reasonable diligence does not require an employer to hire, at wages 25 per cent above the market rate, a set of men who have abandoned its employment, without warning, at a critical time in the conduct of its operations, and banded themselves together to prevent, by intimidation and violence, other workmen from carrying on its legitimate business, nor does it require such an employer to agree not to prefer, or not to prefer in fact, faithful and willing laborers, at going wages, as its employés, to those who have acted in this way, at wages 25 per cent higher. There is nothing in *Brown v. Certain Tons of Coal*, 34 Fed. 913, in conflict with these views.¹

GEORGE W. THOMAS, APPELLANT, v. JOSEPH C. HARTSHORNE, RESPONDENT.

NEW JERSEY COURT OF ERRORS AND APPEALS, NOVEMBER TERM, 1888.

[Reported in 45 *New Jersey Equity*, 215.]

REED, J. During the war of the Revolution, an English frigate, having on board a large amount of specie, sent to this continent to pay the British troops, sunk in the East river in deep water. The *Hussar* was the name of the ship, and the amount of gold coin supposed to have gone down in her was estimated at \$4,800,000.

Several abortive efforts were made, from time to time, to recover the treasure. On the 31st of May, 1880, the defendant, Mr. George W. Thomas, entered into an agreement with the secretary of the treasury of the United States, by the terms of which agreement he, the defendant, was permitted to search for this treasure, he to have, in the event of its capture, ninety per cent of the treasure.

The prosecution of the enterprise required boats, machinery, and men, and the defendant had little or no money to secure them. He obtained moneys in different amounts, at different times, from a number of persons, among whom was the complainant below, Mr. Joseph C. Hartshorne.

¹ See also *Dobell v. Green*, [1900] 1 Q. B. 526; *Lyle Shipping Co. v. Cardiff*, [1900] 2 Q. B. 638; *Wood v. Keyser*, 84 Fed. Rep. 688; 87 Fed. Rep. (C. C. A.) 1007; *Corrigan v. Iroquois Furnace Co.*, 100 Fed. Rep. (C. C. A.) 870; *Durchman v. Dunn*, 101 Fed. Rep. 606; *Hagerman v. Norton*, 105 Fed. Rep. (C. C. A.) 996; *Morgan v. Garfield & Proctor Coal Co.*, 113 Fed. Rep. 520; 35 L. R. A. 623, n.

The understanding between Thomas and those who made the advancements was, that the moneys advanced were to be used in the work required to discover and raise the sunken gold. To each one who advanced money he gave a writing, of which the following is a specimen:

"WHEREAS, I, George W. Thomas, of the borough of Hackettstown, county of Warren, and State of New Jersey, now hold a contract made to me by the Secretary of the Treasury, on behalf of the Government of the United States of America, by which contract I am placed and am now in possession of the remains of the sunken hull of the British frigate *Hussar*, with all the treasure, whether in silver or gold, now or heretofore connected with said sunken hull, and lying in the East River, or Long Island Sound, near Port Morris, and State of New York; and

"WHEREAS, I have received from the sum of dollars, the receipt whereof I hereby acknowledge,

"I do hereby agree that I will, as soon as I recover the said treasure, pay to the said the sum of dollars, with no delay more than will be necessary to convert the same into lawful money of the United States.

"In witness whereof, I have hereunto set my name this day of , A. D. 1883."

The respective sums to be repaid were from ten to fifteen times greater than the sums advanced.

On October 16, 1882, the complainant advanced \$5,000. On March 2, 1883, he advanced an additional \$5,000. On May 13, 1883, he advanced another \$3,000, which last sum was secured by a chattel mortgage on the scow employed by Thomas in his work. The work was prosecuted by Thomas during all the seasons of year when practicable, until January, 1884.

Those who had advanced money then called upon Thomas for an account of the amount and manner in which the moneys had been expended, which account he denied their right to require of him, and which account he refused to render.

The bill in this case was then filed by Hartshorne, on behalf of himself and others who had advanced, and who chose to come in, for an account of, the moneys so received by the defendant. The Vice-Chancellor ordered a decree that an account be taken.

The defendant, upon this appeal, contends, that he is not, in equity, required to give an account of the moneys advanced to him. His counsel insists, that his contract was to repay a much larger sum than that advanced to him upon the happening of a single event, namely, the discovery of the treasure.

He admits that, springing out of the contract expressed in the written stipulation, there was an incidental obligation resting upon Thomas to proceed with reasonable diligence in the work of rescuing

the treasure. But he contends, that so long as the work continued no one was entitled to inquire into the expenditure of the money advanced. If this fully expresses the extent of the duty thrown upon Thomas, then it clearly appears that, at the moment when the bill was filed, there was no right upon the part of Hartshorne to call for an account.

Up to that date the work had proceeded with all practicable expedition. It is true that the government contract was subsequently annulled, and thus Thomas was rendered impotent to pursue his work, but that was a matter arising subsequently to the original institution of this suit.

It may be admitted that, upon the discovery of this treasure, the only right of those advancing the sums would be to recover the sums stipulated for in their contracts. I also think, that so long as Thomas was in a position to prosecute and do the work with reasonable diligence and economy, Hartshorne and others had no right to recover the unexpended portion of the moneys advanced. Nevertheless, it seems clear, that the nature of the contract and the character of the event upon which the complainant was entitled to receive the larger amount, gave him a right to be informed of the rapidity and methods in which the money was being used to bring about the important final event.

By the terms of the contract the complainant could only realize anything upon the success of the search for the gold. Without the money advanced by Hartshorne and others, the search was impracticable. It was clearly understood and implied that the money would be used for the purposes of the search. At what period of time, if ever, the search was likely to be successful, was always uncertain, and became more and still more dubious as time advanced. The chances of a successful termination of the work were dependent upon the length of the period during which it could be continued, and that was dependent upon the ability of Thomas to raise money, and upon the economy and judgment with which the money raised was applied. So, the complainant was entitled, not only to have the work continued, but entitled to know that the fund on hand had been and was being so dealt with that the work was likely to be continued the greatest possible length of time.

In addition, it may be remarked, that there was no certainty how long Thomas would be able to continue the work by means of future advances which he might receive.

He was, at frequent intervals, applying to those who had already put money into the venture for more money, upon the ground that his need of funds was urgent.

This was a strong inducement to risk more money to save that which had already been staked upon the result.

This was an additional reason why these persons should know what had become of the moneys already advanced.

I think, then, that there was existing a right to an accounting at the time of filing the original bill.

But it did not follow, from the existence of a right to an account, that the balance found to be due upon such accounting should be turned over to the complainant. It is clear, that, if it appears that the work had been prosecuted with reasonable diligence and economy, the unexpended balance of moneys advanced could not be diverted from the further prosecution of the venture.

But a new phase was given to the cause during its progress. A supplemental bill was filed, setting up a fact arising subsequent to the filing of the original bill, namely, the fact of the cancellation of the contract of Thomas with the government. The ground upon which the cancellation was determined by the government, or the justice or injustice of that act toward Thomas, we cannot enter into; that is a matter resting between the government and Thomas. [The fact exists that the right to proceed with the work under the government was extinguished.] This fact, taken along with the other facts set out and proved in the cause, shows that the further prosecution of the work became practically impossible to Thomas.

In this posture of affairs, it seems clear that the balance remaining unexpended could not be applied to the purpose for which it was advanced, and the only equitable recipients of such balance are those who made the advancements.

For the purpose of ascertaining such unexpended balance, the decree for an account, made below, is correct; but in taking such an account, in the judgment of the Court, the sum of \$5,000, which appears to have been advanced by Thomas as a special loan, and for which security was taken by way of chattel mortgage, should be excluded from the moneys for which defendant should account.

In this respect the decree below should be modified.¹

NOTE.—The civil law started from a principle opposite to that of the common law, and the modern codes contain provisions excusing an obligor from liability for not performing his obligation if performance was prevented by *vis major* or casualty. The provisions of the French civil code for the general principle and for particular applications are contained in Arts. 1148, 1302, 1647, 1733, 1929, 1954. These provisions have been largely copied in the codes of other countries: Italy, Arts. 1226, 1298, 1504, 1589, 1845, 1868; Spain, Arts. 1105, 1182, *et seq.*, 1487, 1488, 1563, 1766, 1784; Portugal, Arts. 705, 717, 1608, 1436, 1422; Holland, Arts. 1282, 1480, 1546, 1601, 1745, 1748; Switzerland, Arts. 116, 118, 145, 254, 486-488; Chili, 1556, 1670-1680, 1862, 1947, 2242, 2230; Mexico, 1463-1465, 1442 *et seq.*, 2878, 2975, 2976. See also La. Rev. C. C. Art. 1933, *Engster v. West*, 35 La. Ann. 119.

The provisions of the German Bürgerliches Gesetzbuch are somewhat different. See §§ 265, 275, 280 *et seq.*, 285, 287, 291, 323, 425, 815.

The doctrine of the German law before the enactment of the Bürgerliches

¹ Compare *Whincup v. Hughes*, L. R. 6 C. P. 78; *Pinkham v. Libbey*, 93 Me. 575.

Gesetzbuch is shown in the following paraphrase of §§ 264, 315, of *Windscheid's Lehrbuch des Pandektenrechts*:

Impossibility of performance is divided into original and supervening impossibility.

1. Original is divided into

- a. Objective, which is a defence, though the obligor knew of the impossibility.
- b. Subjective, in which case the obligor must pay a money equivalent though he did not know of the impossibility when he entered into the contract.

In case of objective impossibility, however, the obligor is bound to make good to the obligee, if the latter did not know of the impossibility when the contract was made, all damage which the latter has incurred by acting on the basis that there was a valid contract. If the impossibility is only partial, the contract is only partially invalid. Knowledge of the impossibility in this case binds the obligor to make good the whole performance. Subsequent termination of the impossibility makes the contract valid only if such termination was founded in the nature of the impossibility — not if it was accidental.

2. Supervening.

It is not important whether it is subjective or objective, but only whether it has happened because of any fault of the obligor. If not, he is free, and need only perform whatever may remain still possible or give up instead of the object due whatever the event causing the impossibility may have given him. If the impossibility was due to the obligor's fault, he is bound to pay a money equivalent, less any gain the obligee has made by the impossibility. It is further to be observed:

- a. The obligor may by express contract or by statute be liable for impossibility, i. e. take the risk.
- b. If performance is possible only at a disproportionate sacrifice, the obligor is only bound for the real value of the performance.

If the question is whether the supervening impossibility is due to the fault of the obligor, the main rules are:

1. If the impossibility is due to the debtor's fraud, he is always chargeable.
2. If due to his gross negligence, he is also chargeable.
3. If due to ordinary negligence, he is always chargeable if he is accustomed to use greater care in his own affairs.
4. Aside from the cases included under (3) it is the rule that the debtor is chargeable if the impossibility is due to ordinary negligence, but this rule is subject to exception.

430 ✓
 452 ✓
 469 ✓
 477 ✓
 374 ✓
 402 ✓
 403 ✓
 411 ✓
 413 ✓
 416 ✓
 423 ✓
 449 ✓
 425 ✓
 438 ✓
 464 ✓
 473 ✓
 483 ✓
 492 ✓
 4

CHAPTER VI.

ILLEGAL CONTRACTS.

SECTION I.

CONTRACTS IN RESTRAINT OF TRADE.

MITCHELL v. REYNOLDS.

IN THE KING'S BENCH, HILARY TERM, 1711.

[Reported in 1 Peers Williams, 181.]

DEBT upon a bond. The defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's, Halborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis* and *auditis*, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione* *cujus* the said bond was void in law, *per quad* he did trade, *prout ei bene licuit*. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, PARKER, C. J., delivered the resolution of the court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the fame is good; and that the true distinction of this case is, not between promises and bonds, but between contracts with and without consideration; and that wherever a sufficient consideration appears to make it a proper and useful contract. and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a

¹ The cases on this subject are well collected and classified in Wyman's Cases on Restraint of Trade, 125 et seq.

particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and to reconcile the jarring opinions; in order whereunto, I shall proceed in the following method.

1st, Give a general view of the cases relating to the restraint of trade.

2dly, Make some observations from them.

3dly, Show the reasons of the differences which are to be found in these cases; and

4thly, Apply the whole to the case at bar.

As to the cases, they are either first, of involuntary contracts, against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads.

1st, Grants or charters from the crown.

2dly, Customs.

3dly, By-laws.

Grants or charters from the crown may be,

1st, A new charter of incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

2dly, A grant to particular persons for the sole exercise of any known trade; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to Magna Charta. 11 Co. 84.

3dly, A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, sect. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts.

1st, Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good. 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6, 14; 2 Bulst. 195; 1 Roll. Abr. 561.

2dly, For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners. Dyer, 279, b; W. Jones, 162; 8 Co. 121; 11 Co. 52; Carter, 68, 114, held good.

3dly, A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of Rippon. Register, 105, 106.

Restraints of trade by by-laws are these several ways.

1st, To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter, 68, 114; 8 Co. 125. But where there is no precedent custom, such by-law is void. 1 Roll. Abr.

364; Hob. 210; 1 Bulst. 11; 3 Keb. 808. But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2dly, All by-laws made to cramp trade in general, are void. Moor, 576; 2 Inst. 47; 1 Bulst. 11.

3dly, By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases (viz.), if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284; Raym. 288; 2 Keb. 27, 873, and 5 Co. 62, b, which last is upon the by-law for bringing all broadcloth to Blackwell-Hall, there to be viewed and marked, and to pay a penny per piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 809, the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties, are either,

1st, General, or

2dly, Particular, as to places or persons.

General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596; 2 Bulst. 136; Allen, 67.

Particular restraints are either, 1st, without consideration, all which are void by what sort of contract soever created. 2 H. 5, 5; Moor, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 155.

Or 2dly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136; Rogers v. Parry. Though that case is wrong reported, as it appears by the roll which I have caused to be searched, it is B. R. Trin., 11 Jac. 1, Rot. 223. And there solution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98; W. Jones, 13 Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, with or without consideration, which stands upon very good foundation; *Volenti non fit injuria*; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 172; Bragg v. Stanner. The entering upon the trade, and not whether the right of action accrued by bond, promise, or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Allen's, 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st, That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law.

2dly, That when restrained to particular places or persons (if lawfully and fairly obtained) the same is not a monopoly.

3dly, That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly, That it is lawful upon good consideration, for a man to part with his trade.

5thly, That since actions upon the case are actions *injuriarum*, it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously.

6thly, That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly, That no man can contract not to use his trade at all.

8thly, That a particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do,

1st, With respect to involuntary restraints, and

2dly, With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the Crown and by-laws, generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of subject.

2dly, Another reason is drawn from Magna Charta, which is infringed by these acts of power; the statute says, *nullus liber homo, &c., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c.*, and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, no body can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall show the reason of the differences in the cases of voluntary restraint,

1st, Negatively.

2dly, Affirmatively.

1st, Negatively; the true reason of the disallowance of these in any case, is never drawn from Magna Charta; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2dly, Neither is it a reason against them, that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands. J. Jones, 13; Mich. 4; Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favor and indulgence of the law to trade and industry.

3dly, It is not a reason against them, that they are against law, I mean, in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense are reducible under one of these heads.

1st, Either to do something that is *malum in se*, or *malum prohibitum*; 1 Inst. 206.

2dly, To omit the doing of something that is a duty. Palm. 172; Hob. 12; Norton v. Sims.

3dly, To encourage such crimes and omissions. Fitzherb. tit. Obligation; 18 Bro. tit. Obligation; 34 Dyer, 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st, That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12; Cro. Car. 22; Perk. 228.

2dly, That all things prohibited by law, may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se*, nor *mala prohibita*, and the law allowing them in some instances, as in those of customs and assumpsits, they may be restrained by condition.

2dly, Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the public, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands

as possible ; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

3dly, Because in a great many instances, they can be of no use to the obligee ; which holds in all cases of general restraint throughout England ; for what does it signify to a tradesman in London, what another does at Newcastle ? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action. See Puff.¹ lib. 5, c. 2, sect. 3, 21 H. 7, 20.

4thly, The fourth reason is in favor of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being over-stocked with any particular trade ; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

5thly, The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another ; as it must do, if contracts with a consideration were made void. *Barrow v. Wood*, March Rep. 77 ; Mich. 7 Ed. 3, 65 ; Allen, 67 ; 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case ?

Responsive. I do not see why that should not be shown by pleading ; though certainly the law might be settled either way without prejudice ; but as it now stands the rule is, that wherever such contract *stat indifferenter*, and for ought appears, may be either good or bad, the law presumes it *primâ facie* to be bad, and that for these reasons :

1st, In favor of trade and honest industry.

2dly, For that there plainly appears a mischief, but the benefit (if any) can be only presumed ; and in that case, the presumptive benefit shall be over-borne by the apparent mischief.

3dly, For that the mischief (as I have shown before) is not only private, but public.

4thly, There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby ; for it is to be observed, that though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason (*viz.*),

¹ The instances there mentioned are, that if any should agree not to wash their hands, or change their linen, for such a time, there could be no need to trouble a magistrate on the breach of such agreements, which would tend to no consequence when put in execution.

as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As 1st, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place, only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2dly, It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in bonds and covenants, but these latter, though they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, which is void without a consideration, though it be a complete and perfect deed.

3dly, It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly, This shows why promises in restraint of trade have been held good; for in those contracts, it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of JUDGE HALL in 2 H. 5, fol. quinto; for suppose (as the case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner¹ of expressing it. Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement

¹ Hall expressed himself thus: A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, &c., per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy.

itself is good, but when it is reduced into the form of a bond, it immediately becomes void ; but for what reason, see 3 Lev. 241. Now a bond may be considered two ways, either as a security, or as a compensation ; and

1st, Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

2dly, Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract. lib. 3, c. 2, sect. 4.

It would be very strange, that the law of England that delights so much in certainty, should make a contract void, when reduced to certainty, which was good, when loose and uncertain ; the cases in March's Rep. 77, 191, and also Show. 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st Objection. In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

Response. This objection holds equally against all bonds whatever.

2d Objection. Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Response. The case of an infant stands on another reason (*viz.*), a general disability to make a deed ; but here both parties are capable ; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable ; but it is otherwise here.

Also the case of a sheriff is very different ; for at common law he could take nothing for doing his duty, but the statute has given him certain fees ; but he can neither take more, nor a chance for more, than that allows him.

3d Objection. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury ; but what is there to be tried by a jury in this case?

Response, 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

2dly, It is to ascertain the damages ; but *cui bono* (say they) should that be done? is it for the benefit of the obligor?

Response. Certainly it may be necessary on that account for these reasons :

1st, A bond is more favorable contract for him than a promise ; for the penalty is a re-purchase of his trade ascertained before hand, and on payment thereof he shall have it again ; he may rather choose to be bound not to do it under a penalty, than not to do it all.

2dly, However it be, it is his own act.

3dly, He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly, Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent, nay by the injured party without the concurrence of the other; and if so, then *a fortiori* he may bind himself by a penalty.

Objection. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labors to prevent.

Response. But this is no more to be presumed than false testimony, and in such a case, I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract.

The application of this to the case at bar is very plain: here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade of this neighborhood? the concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration (*viz.*), the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.

JOHN KINDLAN COLLINS v. JAMES LOCKE.

IN THE PRIVY COUNCIL, JULY 5, 8, 26, 1879.

[Reported in 4 Appeal Cases, 674.]

THE judgment of their Lordships was delivered by Sir Montague E. Smith:—

The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of Melbourne for regulating and distributing among them the stevedoring of ships in that port.

By the deed which contains the agreement, the four parties to it, *viz.*, the firm of George Washington Robbins and Francis Robbins Collins (the defendant in the action, and the present appellant), Alfred John Johnson, and Locke (the plaintiff, and the respondent in this appeal), covenanted with each other, first, that "as between the par-

ties" Messrs Robbins should "be absolutely entitled to the business of stevedoring all ships which should arrive in the port of Melbourne consigned to the firm of Dalgety, Blackwood, & Co.," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the defendant to those consigned to J. H. White & Co., Johnson to those consigned to MacFarlane & Co., and the plaintiff to those consigned to Holmes, White, & Co., R. Towns & Co., and King, Meng, & Co., and that the parties should be absolutely entitled for their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows: "And neither of them the said several parties hereto shall not (*sic*), nor will, save as hereinafter expressly provided, undertake to be in any way concerned in or interfere in the stevedoring, either in whole or in part, of any ship or vessel consigned to any of the said persons or firms hereinbefore particularly mentioned otherwise than according to the provision in that behalf hereinbefore contained."

The second and third clauses of the deed are in the following terms:—

"2. That if any or either of the said firms hereinbefore named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. James Allison Crane, and an umpire to be named by such arbitrators, in case they disagree.

"3. That the stevedoring of all ships not consigned to any of the hereinbefore mentioned firms shall be taken and stevedored in the following order: that is to say, the first ship to arrive after the date hereof to be stevedored by the said John Kindlan Collins, the second by the said Francis Robbins, the third by the said George Washington Robbins, and the fourth by the said Alfred Joseph Johnson, and so on in such order during the continuance of these presents, it being expressly agreed that the said James Locke shall not be entitled to the stevedoring of any ships or vessels save those consigned to the said firms of Holmes, White, & Co., R. Towns & Co., and King, Meng, & Co."

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships; and in case any

firm should cease to carry on business, the party losing such firm should be entitled to make a selection of another firm in Melbourne, subject to arbitration in case of disagreement.

The 9th clause is a covenant for the payment of £1,000 as liquidated damages for the breach of any of the covenants, and the 10th contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the plaintiff, was dissolved, and a new firm, Stewart, Couch, & Co., succeeded to its business, and was selected by the plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the plaintiff's counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the plaintiff had selected Stewart, Couch, & Co. in the place of R. Towns & Co.; that certain ships arrived in Melbourne consigned to Stewart, Couch, & Co., and that although that firm did not refuse to allow the stevedoring of these ships to be done by the plaintiff, yet the defendant did the stevedoring of them, whereby the plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor award made. The fourth sets out the deed at length, and avers that there was no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the plaintiff selected Stewart, Couch, & Co. in place of R. Towns & Co.; and the last plea avers that the other parties to the deed did not agree to such selection.

The plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships — the "Jason" "Clara," and "Eastern Monarch" — as having been stevedored by the defendant in breach of the agreement; but it has been admitted that the action is not maintainable in respect of the "Jason."

The evidence given at the trial was short and meagre. The following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this appeal: —

The "Clara" arrived at Melbourne consigned to Stewart, Couch, & Co. No question arises upon the unloading, which was done by the plaintiff. The "Clara" then passed out of the hands of Stewart, Couch, & Co. into those of Poole, Picken, & Co., who employed the defendant to stevedore her for the outward voyage, which he did.

The "Eastern Monarch" also arrived at Melbourne consigned to Stewart, Couch, & Co. The defendant both loaded and unloaded her. Stewart, Couch, & Co. had nothing to do with the stevedores. This

ship also passed into the hands of other merchants, viz., Bright and J. H. White, who employed the defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the plaintiff, with the following damages: viz., £125 for the "Clara," and £155 for the "Eastern Monarch." A rule *nisi* was obtained to set aside the verdict and enter it for the defendant, on the ground that the third plea was proved, or to reduce the damages to £20, on the ground that under the terms of the agreement the plaintiff was only entitled to recover the profit of unloading the "Eastern Monarch."

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above rule, and has also given judgment for the plaintiff upon the demurrers to the third and fourth pleas.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are "those which shall arrive in the port of Melbourne consigned to particular firms." This language is apparently used to describe the class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shown to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the plaintiff, who insists on the construction which enables him, if

the action is otherwise maintainable, to retain the full amount of damages awarded by the jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement having these objects is invalid, if carried into effect by proper means, — that is, by provisions reasonably necessary for the purpose, — though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to *Mitchel v. Reynolds* in the first volume of *Smith's Leading Cases*. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The courts are not disposed to measure the adequacy of the consideration, if a real and *bonâ fide* consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by Lord Ellenborough, in delivering the judgment of the court in *Gale v. Reed*, 8 East, 86, "The restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other." He went on to say, "As the carrying the restraint further would be arbitrary and useless between the parties, a construction which would have that effect must be reluctantly resorted to;" and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of *Horner v. Graves*, 7 Bing. 743, Tindal, C. J., in delivering the judgment of the court, said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of *Mallan and Others v. May*, 11 M. & W. 653. There, by a deed under which the defendant became assistant to the

plaintiffs in their business of surgeon dentists, he covenanted that he would not carry on that business in London, "or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the defendant's service." The declaration contained two breaches, — the first for practising in London, the second for practising in another place where the plaintiffs had practised. The court adopted the principle of the decision in *Horner v. Graves*, 7 Bing. 743; and holding the contract to be divisible, decided that the prohibition against practising in London was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the plaintiffs required, and was, therefore, an unreasonable restriction. The court accordingly gave judgment for the plaintiffs on the first breach, and for the defendant on the second. The principles on which this case was decided were upheld by the Exchequer Chamber in *Prie v. Green*, 16 M. & W. 346.

Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz., that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it; at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by clause 2 as regards the original consignees, and therefore in the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work; in the words of Mr. Justice Fellows, such ships are, "so to speak, tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of

employing any of these parties, who are probably the chief stevedores of the port, to load their ships unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above-mentioned consequences is that on which the plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon the second clause of the agreement, because Stewart, Couch, & Co. did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the court below in dealing with the second breach, the action will not lie under clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was held to be void in *Hilton v. Eckersley*, 6 E. & B. 47; *ibid.* 67; whilst it cannot be justified on the ground upon which Mr. Justice Erle (who differed from the majority of the court) thought the contract in that case might be supported, viz., that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interests as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the courts to enforce it. They have already said that this objection does not apply to clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the defendant as to the first and third breaches, but for the plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lordships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration clause (clause 11) affords an answer to the action, there having been no arbitration and no award under it.

Since the case of *Scott v. Avery*, in the House of Lords (5 H. L. C. 811), the contention that such a clause is bad as an attempt to oust the courts of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties, to be collected from its language. The provision in the second clause of this contract falls, as their Lordships have already said, within the first-mentioned category, because the equivalent to be given in lieu of the profit would not be payable until the amount of it had been ascertained in the manner prescribed. But the 11th clause, according to the intention to be collected from the whole deed, appears to them, though by no means with clearness, to be a collateral and independent agreement. It extends to all doubts, differences, and disputes which should arise touching the agreement, and stipulates that all matters in difference should be submitted to arbitrators.

The learned counsel for the defendant strongly relied on the part of the clause which is in these words: "And the award of the arbitrators shall be conclusive, and any of the parties shall not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them, or otherwise in accordance with the terms and conditions of the said award, as to the acts or deeds to be made, done, executed, and performed."

This passage, no doubt, contains negative words, but there is ambiguity in the words "in respect of the matters so submitted as aforesaid," as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed. Looking out of this clause, it is material to consider clause 9, which is as follows: "That in case of any breach or non-performance by any of the parties hereto of any or either of the covenants or agreements hereinbefore contained, such party so committing such breach, or not performing such covenant or agreement, shall and will well and truly pay unto each of the other parties hereto respectively, their or his executors, administrators, or assigns, the sum of one thousand pounds, as and for liquidated damages for such breach or non-performance, but without prejudice nevertheless to the right of any of the said parties hereto to enforce the specific performance of the covenants and agreements hereinbefore contained, or any or either of them."

It may be inferred from this clause that the parties contemplated that an action might be brought for these damages, and with reference to the proviso to the clause, that they intended to reserve the right to

bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the court below on this point.

The other points mentioned by the appellant's counsel were disposed of during the argument.

In the result, their Lordships are of opinion that the rule *nisi*, so far as it prays to enter the verdict for the defendant on the first and second breaches, should be made absolute, and as to the rest should be discharged; that the judgment for the plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the plaintiff on the demurrer to the fourth plea should be reversed as to the 1st and 3d breaches, and judgment entered as to these breaches for the defendant, and they will humbly advise her Majesty accordingly.

The appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the costs of this appeal.

THORSTEN NORDENFELT, APPELLANT, v. THE MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY, LIMITED, RESPONDENTS.

IN THE HOUSE OF LORDS, JULY 31, 1894.

[Reported in [1894] *Appeal Cases*, 535.]

LORD HERSCHELL, L. C. My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms "(2.) The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings, or carriages, gunpowder explosives, or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company: provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of recon-

Gunpowder & Ammunition Co. Ltd.

stitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the good-will of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3d of July, 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3d of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of the 3d of July,

but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the good-will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good-will of the appellant's business, and was designed for the protection of the good-will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good-will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. (Upon the sale by the appellant to the Nordenfelt Company, the good-will was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company.) But in the agreement for the amalgamation (to the making of which, as I said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shown, stated to the world to be the acquisition of the good-will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good-will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by LORD MACCLESFIELD in his celebrated judgment in *Mitchel v. Reynolds*.¹ That was a case of particular restraint, and the covenant was held good, the Chief Jus-

¹ 1 P. Wms. 181.

tice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of *Master, &c., of Gunmakers v. Fell*,¹ WILLES, C. J., said the general rule was "that all restraints of trade (which the law so much favors), if nothing more appear, are bad. . . . But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of *Horner v. Graves*,² TINDAL, C. J., said: "The law upon this subject (*i. e.* restraint of trade) has been laid down with so much authority and precision by PARKER, C. J., in giving the judgment of the Court of B. R. in the case of *Mitchel v. Reynolds*,³ which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'"

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, PARKER, C. J., says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather in-

¹ Willes, at p. 358.

² 1 P. Wms. 181.

³ 7 Bing. 735.

stances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this is an indication of opinion on the part of TINDAL, C. J., that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by PARKER, C. J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of TINDAL, C. J.'s opinion by his judgment in the subsequent case of *Hinde v. Gray*.¹ In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, TINDAL, C. J., saying that it was "assigned on a covenant which according to the case of *Ward v. Byrne*,² was void in law." This is, to my mind, only intelligible if *Ward v. Byrne*, which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded as determining that the covenant in question in *Hinde v. Gray* was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by *Ward v. Byrne*; but TINDAL, C. J., did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde v. Gray*, the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward v. Byrne*, except to say, that

¹ 1 Man. & G. 195.

² 5 M. & W. 548.

although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognize that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some color was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shown by his notes to *Mitchel v. Reynolds*.¹ He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colorable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of *WILLES* and *KEATING, JJ.*, who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

In the year after the decisions of *Hinde v. Gray*² the case of *Whittaker v. Howe*³ came before LORD LANGDALE. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favor at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel v. Reynolds* was cited in argument, but neither *Ward v. Byrne*⁴ nor *Hinde v. Gray* appear to have been brought to the notice of the Court. LORD LANGDALE expressed himself thus (*Whittaker v. Howe*): "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as LORD KENYON said in *Davis v. Mason*,⁵ 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned judge distinctly indicated that he had not arrived at an

¹ 1 P. Wms. 181.

² 1 Man. & G. 195.

³ 3 Beav. 383, 394.

⁴ 5 M. & W. 548.

⁵ 5 T. R. 118.

irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by WILLES and KEATING, JJ., as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde v. Gray*¹ should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather Cloth Company v. Lonsant*,² JAMES, V.-C., said: "I do not read the cases as having laid down that un rebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in *Rousillon v. Rousillon*,³ FRY, J., thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognize and those which refuse to recognize this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years.

¹ 1 Man. & G. 195.

² Law Rep. 9 Eq. 345.

³ 14 Ch. D. 351.

To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

When LORD MACCLESFIELD emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavor by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action (see Puffendorf, lib. 5, c. 2, s. 3, 21 H. 7, 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. (But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable.) I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognized that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of LORD MACCLESFIELD's judgment will show that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be

treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognized in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good-will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the good-will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good-will were in such cases rendered unsalable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner v. Graves*,¹ in considering whether the agreement was reasonable. TINDAL, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by LORD BOWEN, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the re-

¹ 7 Bing. 735, 743.

spondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.¹

Contract in restraint of Trade

JULIAN L. HERRESHOFF v. A. BOUTINEAU.

RHODE ISLAND, APRIL 14, 1890.

[Reported in 17 *Rhode Island*, 3.]

BILL IN EQUITY for an injunction. On demurrer to the bill.

STINESS, J. The complainant, director of a school of languages in Providence, employed the respondent to teach French from January 7, 1889, to July 1, 1889. The contract, in writing, provided that the respondent would not, during the year after the end of his service, "teach the French or German language or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person or persons or institutions that teach them in the said State of Rhode Island." The respondent's service ended July 1, 1889; after which time he gave lessons in French in Providence. This suit is brought to restrain him from so doing within the time covered by this contract. The respondent demurs to the bill;

¹ LORDS WATSON, ASHBOURNE, MACNAGHTEN, and MORRIS delivered concurring opinions.

contending, first, that the contract is void on the ground of public policy, because it imposes a general restraint throughout the State; and, secondly, because it is unreasonable.

Is the contract void? For a long time, beginning with the Year Books, contracts limiting the exercise of one's ordinary trade or calling met with much disfavor in the courts. Any limitation whatever was considered, in the first reported case, Year Book, 2 Hen. V., Pasche, fol. 5, case 26, (so far contrary to law that a plaintiff suing thereon was sworn at by the judge and threatened with a fine.) But it was soon found that, to some extent at least, such contracts help rather than harm both public interests and private welfare; that they are necessary to trade itself, in order to secure the sale, at fair value, of an established business, by protecting it against the immediate competition of the seller; also to enable one to learn a trade or get employment from another, free from the risk of having the knowledge and influence thus gained used to the employer's damage; to encourage investment in business enterprises under reasonable safeguards; and for other equally evident reasons. Accordingly exceptions to the early doctrine were recognized from time to time until the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, (when the court established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good,) "that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained,) but with this constant diversity, viz., where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive." It is to be observed that the contract in this case was limited in time to five years, the term of the lease of a bakehouse which the plaintiff had bought of the defendant; and also limited in space to the parish of St. Andrew's, Holborn. (The case therefore did not call for decision upon a contract running throughout the kingdom.) Nevertheless, it has since been commonly assumed as the settled rule of law that such a restraint is contrary to public policy and void. The principle upon which this rule is put is, that the public have the right to demand that every person should carry on his trade freely, both for the prevention of monopoly and of unprofitable idleness. The argument is, if the restraint is general throughout the realm, the public interest is interfered with, since the party restrained can only resort to his trade for a livelihood by expatriation. But if the restraint be local and partial, the party and the public may still have the benefit of his services in his own land, in some other place. While this distinction has frequently been recognized, the cases in which it has had the sanction of a decision have been few. In *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, Fry, J., mentions only two, and these, he says, seem to have been decided upon the ground of unreasonableness, rather than upon the ground

of universality. In other words, the universality was held to be unreasonable. This case, following *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 H. & N. 189; and *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, expressly holds there is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The respondent urges that *Rousillon v. Rousillon* has been overruled by the recent case of *Davies v. Davies*, L. R. 36 Ch. Div. 359; but we do not think this is so. While *Cotton, L. J.*, showing great willingness if not anxiety to overrule it, based his opinion upon the ground that the restriction was void because unlimited in space, *Bowen, L. J.*, did not put his decision on that ground, and *Fry, L. J.*, adhered to his opinion in *Rousillon v. Rousillon*. That *Davies v. Davies* was not received in England as overruling the last-named case, see note to the case in *Law Quarterly Review*, vol. iv., p. 240. In view of these cases we do not think it is now the rule in England that restraint throughout the kingdom is absolutely void. In this country the cases have been quite similar to those in England. In the recent case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, *Andrews, J.*, says: "(It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial.) The same is generally true of the American cases." In that case the defendant covenanted, for the period of ninety-nine years, not to engage in the manufacture or sale of friction matches within any of the States or territories of the United States, except Nevada and Montana. The complainant sought to restrain a breach of that covenant in New York, the respondent claiming that the covenant, being general as to New York, was void. But the court declared it to be valid, in a strong and thorough opinion, showing the history of litigation and the tendency of recent judicial decision upon this subject. Taking this case in connection with *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, we think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a State. Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the State of the benefit of their industry. It would therefore be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public when he agrees, for a sufficient consideration, not to follow some one calling within the limits

of a particular State. There is no expatriation in moving from one State to another; and from such removals a State would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the State.

(Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract. Yet when it is a restriction upon individual and common rights, which only oppresses one party without benefitting the other, all courts agree that it should not be enforced.) In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. (For example, if one has sold the good-will of a mercantile enterprise, receiving pay for it upon an agreement not to engage in the same business in the same State for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business.) In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail and sending goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restriction embracing the State or even a larger territory could not be said on that account to be unreasonable, for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the Law Quarterly Review, above cited: 'Covenantors desiring the maximum of protection have no doubt a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all.' Beside the matter of protection, the hardship of the restriction upon the party and the public should also be considered.

In the present case, we think the restriction is unreasonable. Not, as a rule of law, because it extends throughout the State, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefitting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the State; and that, by reason of the small extent of the State and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils, from all parts of the

State, may come to Providence as a centre, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence, or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport; thereby admitting that the restriction is greater than the necessity. The people of Newport, Westerly, and other places have the right to provide for education in languages without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place, who might leave the complainant if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable; but we think it unreasonable to go further.

The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school from teachers who may entice away his scholars after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained. *Demurrer sustained.*

Amasa M. Eaton, for complainant.

Albert A. Baker, for respondent.

ANCHOR ELECTRIC COMPANY v. HORATIO C. HAWKES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 24-MAY 18, 1898.

[*Reported in 171 Massachusetts, 101.*]

BILL IN EQUITY, filed February 1, 1898, to restrain the defendant from competing with the plaintiffs in violation of a contract. Hearing before HOLMES, J., who ordered an injunction against the defendant carrying on business in Boston, where he had established himself, or the vicinity, and, at his request, reported the case to the full court. If the ruling was right, the injunction was to stand, and the case was to go to a master to assess damages, otherwise, such decree was to be made as equity might require. The facts appear in the opinion.

F. Hutchinson, for the defendant.

S. L. Whipple (*W. R. Sears* with him), for the plaintiffs.

KNOWLTON, J. The only question which we need to discuss in this case is whether the stipulation on which the bill is founded is void as against public policy. The stipulation is as follows: "6. It is further agreed by all the persons whose names are set hereunder,

officers of the corporations herein above described, that they will not hereafter at any time, directly or indirectly, as partner, agent, officer of a corporation, or in any other wise, enter into or conduct or assist in conducting any business that shall in any way interfere with or compete with the proposed business of said Anchor Electric Company for a period of five years; except that any one of said persons sever connection with said Anchor Electric Company as provided by paragraph six of said agreement of September 29, 1894." The defendant was the business manager of the Hawkes Electric Company, a corporation, and a shareholder therein; Norman Marshall was the business manager of the Iona Manufacturing Company, a corporation, and a shareholder therein; and Philip M. Reynolds was the business manager of the Brown Electric Company, a corporation, and a shareholder therein. On September 29, 1894, these three persons entered into an agreement in writing to form a new corporation under the laws of Maine, of which Hawkes was to be the president, Reynolds the treasurer, and Marshall the vice-president and assistant secretary, and of which these three were to be the managing board of directors. Four other persons were to be selected to make up the full board of directors, of whom one was to be chosen from the board of directors of each of the above-mentioned corporations. Each of these corporations was to sell all its assets to the new corporation, at their actual cash value, to be determined as provided in the writing, and an agreed price of a substantial amount fixed by the writing was to be allowed by the new corporation for the good-will of each of the three corporations. Each of these three persons was to subscribe for and take one third of the capital stock of the new corporation, and the assets of each of the three corporations, at the value ascertained as provided by the writing, were to be received *pro tanto* by the new corporation in payment for this stock, and the balance was to be paid for by the subscribers in cash. The three persons severally agreed that so long as the agreement should continue they would "devote themselves unreservedly to the interest and duties of the office which they occupy and the promotion in every way of the interests of the corporation to be formed." On the back of the writing was an agreement, signed by the three, fixing the salaries which they were severally to receive in the new corporation, and an additional stipulation as to the allowance for assets of the three corporations. It was provided that the agreement should be binding only as approved by a majority of the shareholders or boards of directors of the three corporations. The Anchor Electric Company was afterwards established as a corporation under the laws of Maine, in accordance with the contract. In this connection there was another agreement made on October 12, 1894, between the Anchor Electric Company and the other three corporations, whereby the assets and good-will of the three were transferred to the new corporation at specified agreed prices, which were paid in stock of the new corporation. A part of this agreement of the

three old corporations with one another and with the Anchor Electric Company was in these words: "They will not hereafter at any time continue the business of manufacturing and dealing in electrical goods or specialties of any sort or description, after the fifteenth day of October, 1894, except to sell and dispose of merchandise on hand at this date not herein transferred to the Anchor Electric Company, and will do no business of any sort or description except such as is necessary in the liquidation of said three electric companies." The agreement was signed by each of the four corporations, by their respective officers, Hawkes, Reynolds, and Marshall, and the stipulation in question was the sixth article of the agreement. The judge found that the instrument had been executed in all its parts, except this sixth article, and had been adopted by the corporations. There was a provision in the first agreement whereby any one of the three persons could withdraw from the new corporation if he was at any time put at a financial disadvantage by the other two in reference to salary or income, and could sell his stock to the others at a price to be agreed upon or fixed by arbitration. The judge before whom the case was heard found that the defendant sold his stock in the new corporation and withdrew from it, but not under the provision above referred to, and that he has violated and intends to violate the sixth article of the last agreement. He found that all the allegations of the bill bearing upon the validity of the sixth article were proved. He also found as a fact, so far as he could properly so find, that the sixth article was reasonable and necessary for the carrying out of the transactions set forth in the agreement, and that the value of the stock of the Hawkes Electric Company was largely dependent upon its being kept. It is found that the business of the plaintiff is of a nature that may extend over the whole country. We are thus brought to a consideration of the law applicable to the case.

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: they tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade, the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement

of an individual to cease to work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good-will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good-will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good-will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the House of Lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good-will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the distinction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the House of Lords in the case of *Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.*, [1894] App. Cas. 535, affirming the unanimous judgment of the Court of Appeals in [1893] 1 Ch. 630, it is now settled in England that a covenant unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction. *Oakdale Manuf. Co. v. Garst*, 18 R. I. 484; *Fowle v. Park*, 131 U. S. 88, 97; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Tode v. Gross*, 127 N. Y. 480; *Diamond Match Co. v. Roeber*, 106 N. Y.

473; *Whitney v. Slayton*, 40 Maine, 224; *Western Wooden Ware Association v. Starkey*, 84 Mich. 76.

In this Commonwealth the general doctrine of the cases seems to be that, in connection with the sale of the good-will of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443; *Palmer v. Stebbins*, 3 Pick. 188; *Pierce v. Woodward*, 6 Pick. 206; *Angier v. Webber*, 14 Allen, 211; *Dean v. Emerson*, 102 Mass. 480; *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149. In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold. In *Bishop v. Palmer*, 146 Mass. 469, relied on by the defendant, the covenant was unrestricted as to space, and was made in connection with the sale of the property and good-will of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of *Gamewell Fire Alarm Telegraph Co. v. Crane*, 160 Mass. 50, is not inconsistent with the contention of the plaintiffs. It is said in the opinion, that the "plaintiff did not buy the good-will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus." A ground of the decision, stated by a majority of the court, is as follows: "The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion."

Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear under the authorities in Massachusetts that the stipulation goes no further than is reasonably necessary to protect the good-will of the business sold by the defendant's corporation, and that it should therefore be held valid, unless a distinction is to be made between competition with the business of the Anchor Electric Company and competition with the business sold by the defendant and his company. The business sold by the defendant was chiefly installing and constructing electric plants and appliances. The business of the new corporation included with this that which formerly was done by the other two companies, namely, manufacturing and dealing in electrical appliances.

In considering this branch of the case, the nature of the contract of sale should be regarded. The defendant's business was sold to be conducted as a part of a new and more general business. Very likely the price paid for it was larger, and the good-will was deemed more valuable because it was to be so conducted. The plaintiff corporation

carried on different but closely connected departments of the electrical business, and the different departments were so related to one another that sometimes it would be difficult, if not impossible, to distinguish between competition with one department and competition with another.

Moreover, this was a contract for mutual profit in conducting the new business, which, under the findings of the Court, has all presumptions in its favor. Each party was to devote himself to the interests of the new corporation. Although the parties provided for the establishment of a corporation, their arrangement was in the nature of a copartnership. The profits of the new corporation were to be shared by the old corporations, which had sold their property and become stockholders in the new one. It is difficult to see any good reason why the contract of the three persons to promote the interests of the new corporation should not be binding upon them. This contract necessarily includes the agreement not to enter into competition against the new corporation. The case seems to come within the language of CHIEF JUSTICE CHAPMAN in *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73, 75, where he says the "defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him."

We are of opinion that the stipulation not to compete with the business of the plaintiff corporation is as binding on the defendant as if it were merely not to compete with such business as previously had been done by the Hawkes Electric Company.

Decree for the plaintiffs.

JULIUS GARST v. FRANK M. HARRIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 2-18, 1900.

[Reported in 177 Massachusetts, 72.]

CONTRACT, for breach of the following agreement:

"For and in consideration of the per cent deducted from the full retail price, as per list appended hereto, allowed by the Phenyo Caffein Company, the vendee or retailer hereby agrees that he will not sell, nor allow any one in his employ to sell, directly or indirectly, Phenyo Caffein, 25 cent size, for less than 25 cents a single box, five boxes

for one dollar, twelve boxes for two dollars and twenty-five cents, nor the 10 cent size for less than the face price.

"The vendee, or retailer, further agrees, that if he violates the terms of this contract, he will pay to the Phenyo Caffein Company the sum of \$21, that sum being the agreed amount that the Phenyo Caffein Company would be damaged by a breach of this agreement. This clause, as to the amount of damages, is inserted because it is recognized and agreed that a breach of this agreement would cause the Phenyo Company to suffer a material loss, and also that it would be very difficult and usually impossible to prove the exact amount of such loss.

"The vendee, or retailer, further agrees that the acceptance of said goods, with the notice of the conditions of sale, shall be held to be an assent on his part to the foregoing terms, and an agreement with the Phenyo Caffein Company, to sell subject to the price restrictions fixed by it.

"This agreement is made subject to the stipulation that in case the vendee, or retailer, should desire to discontinue the sale of Phenyo Caffein, and notifies the Phenyo Caffein Company of that fact, in writing, said company agrees to buy from the vendee, or retailer, any of the said Phenyo Caffein at the net cost price at which it was sold to him."

Then followed a specification of the price and discount to the retail trade.

The case was submitted to the Superior Court, and, after judgment for the plaintiff for \$21, by GASKILL, J., to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

W. C. Mellish, for the defendant.

W. Thayer (H. W. Cobb, with him), for the plaintiff.

HOLMES, C. J. This is an action of contract to recover \$21 as liquidated damages for breach of an agreement not to sell Phenyo Caffein below a stipulated price. Phenyo Caffein was a proprietary medicine purchased by the defendant of the plaintiff. At the time of the sale and as a part of it a written statement of terms containing this agreement was read to the defendant and delivered to him. One stipulation expressed in the document was that the acceptance of the goods with the notice of the conditions of the sale should be an assent to the terms. The defendant accepted the goods and expressed no dissent. There is no question, therefore, that he agreed to those terms upon the consideration of the sale, which was made with a deduction from the full retail price. The defendant sold the goods so purchased below the stipulated price and broke his contract. So much of the defendant's argument as denies the agreement, the consideration, or the applicability of the contract to the goods sold needs no further discussion.

The rest of the defence needs but a few words. It is said that the contract was unlawful as in restraint of trade. Some limits were set

to the inherited doctrine on this subject by the recent case of *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, as they had been in England before. When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough. See *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92; *Fowle v. Park*, 131 U. S. 88, 97; *Walsh v. Dwight*, 40 App. Div. (N. Y.) 513.

It is suggested that the sum agreed upon in the writing as liquidated damages is a penalty. But it is admitted in the agreed facts that the damages are substantial and difficult to estimate, and it was recognized in the contract that they would be so. It has been decided recently that parties are to be held to their words upon this question except in exceptional cases where there are special reasons for a different decision. *Guerin v. Stacy*, 175 Mass. 595. In this case there is every reason for upholding the general rule. *Chase v. Allen*, 13 Gray, 42; *Lynde v. Thompson*, 2 Allen, 456.

Judgment for the plaintiff.

R. WILSON MORE ET AL. v. J. L. BENNETT ET AL.

ILLINOIS SUPREME COURT, JANUARY 18, 1892.

[Reported in 140 Illinois, 69.]

MR. JUSTICE BAILEY delivered the opinion of the court.

The question is raised by counsel and discussed at some length, whether membership in the Chicago Law Stenographic Association established a contractual relation between the plaintiffs and defendants which gives to the plaintiffs a right of action against the defendants, for a violation of any of the rules of said association, as for a breach of contract; and also, whether the only remedy for a violation of said rules is not that provided by the by-laws of the association, viz., a fine, to be imposed upon the offender, after a trial and conviction before an arbitration committee, duly appointed for that purpose. But as we view the case, it will be unnecessary for us to consider these questions, since, admitting that the constitution and by-laws of the association were in the nature of a contract as between the members, *inter se*, we are of the opinion that the contract thus established is so far obnoxious to well settled rules of public policy as to render it improper for the courts to lend their aid to its enforcement.

Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the aver-

ments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules.

The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not indeed a subordinate application of the same rule. As said by Mr. Tiedeman: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities or services. All combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal that agreements to combine cannot be enforced by the courts." Tiedeman on Commercial Paper, sect. 190.

Many cases may be found in which the doctrine here stated has been laid down and enforced. Thus, in *Stanton v. Allen*, 5 Denio, 434, where an association among the whole of a large part of the proprietors of boats on the Erie and Oswego canals was formed under an agreement to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in similar business out of the association, it was held that, as the tendency of such agreement was to increase prices and to prevent wholesome competition, as well as diminish the public revenue, it was against public policy and void by the principles of the common law.

In *Hooker v. Vandewater*, 4 Denio, 349, the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement in which, "for the purpose of establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same," they agreed to run for the residue of the season of navigation at certain rates of freight and passage then fixed upon, but which should be changed whenever the parties should deem expedient, and to divide the net earnings among themselves according to certain fixed proportions; and it was held, in a suit on the agreement against a party who failed to make payment according to its terms, that the agreement was a conspiracy to commit an act injurious to trade, and was illegal and void.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, five

coal companies in Pennsylvania entered into an agreement in New York, to divide two coal regions of which they had control; to appoint a committee to take charge of their interests and decide all questions, and appoint a general agent at a certain point in the State of New York, the coal mined to be delivered through him, each company to deliver its proportion at its own cost at the different markets, at such time and to such persons as the committee should direct, the committee to adjust all prices, rates of freight, &c., and settlements to be made between the several companies monthly; and it was held in a suit brought by one of said companies against another, to enforce a liability arising under said contract, that the contract was in violation of a statute of New York making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and was also against public policy and therefore illegal and void, the court laying down the rule, among other things, that every association formed to raise or depress prices beyond what they would be if left without aid or stimulus, was criminal.

In *Craft v. McConoughy*, 79 Ill. 346, a contract was entered into by all the grain dealers in a certain town, which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town, and it was held on bill filed for an accounting and distribution of profits, that such contract was in restraint of trade and consequently void on grounds of public policy. In discussing the principles involved, this court said: "While these parties were in business in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts for with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection."

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been, a combination or conspiracy among a number of persons engaged in a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts therefore will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected.

Counsel seek to distinguish this case from those cited, by the circum-

stance alleged in the second count of the declaration, that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into, by a vendor of a business and its good-will, with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection.

It may also be observed that, by the constitution of the association any reputable stenographer regularly engaged in law reporting in Cook county is eligible to membership, and if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters.

We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.

Judgment affirmed.

EMERY ET AL. v. OHIO CANDLE CO.

OHIO SUPREME COURT, MAY 6, 1890.

*[Reported in 47 Ohio State, 320.]***ERROR** to the Superior Court of Cincinnati.

In 1880 an unincorporated company was formed, to continue six years, called The Candle Manufacturers' Association, which included the manufacturers of ninety-five per cent of the star candles in that part of the United States lying east of the 114° of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement; and is found, as a fact, to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and whether he did, or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years; thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low.

The receipts of the association were placed in a selected depository, The First National Bank of Cincinnati, to the credit of an executive committee, consisting of three members, selected by the association, and could only be paid out on a check signed by at least two of them. The claims of all members were adjusted by this committee.

The Ohio Candle Company, incorporated under the laws of this State, joined the association in 1883, and withdrew therefrom in March, 1884. During the month of January of that year it had paid into the association \$22.40, but there was due to it, under the terms of the agreement, as profits for that month, the sum of \$2,151.17. The committee agreed to pay the company the sum it had paid in, but refused to pay the sum due as profits, on the ground that by withdrawing before the expiration of the life of the association it had violated the agreement, and was entitled to none of its gains. Thereupon the company brought suit for the amount against the members composing the committee, to which the bank was made a party, asking that the bank be ordered to pay the money to the plaintiff, or that a judgment be rendered in its favor for the amount with interest.

Issues of fact having been made up, the case was tried to the court, and reserved for hearing in general term, which made a finding of facts—the substance of which has been stated—and rendered judgment against the members of the committee, which is sought to be reversed on the ground that it is against the law.

Perry & Jenay, for plaintiffs in error.

Ramsey, Maxwell, & Ramsey, for defendants in error.

By the COURT. We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defence on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defence, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill-gotten gains. The case of *Norton v. Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement. See *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 6 Southern Reporter, 888, where *Brooks v. Martin*, 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.¹

Judgment reversed, and the petition of plaintiff below dismissed.

SECTION II.

Wagers and Gaming Contracts.

HAMPDEN v. WALSH.

IN THE QUEEN'S BENCH DIVISION, JANUARY 17, 1876.

[Reported in 1 *Queen's Bench Division*, 189.]

THE judgment of the court (Cockburn, C. J., and Mellor and Quain, JJ.), was delivered by —

COCKBURN, C. J. This is an action brought to recover the sum of 500*l.* deposited by the plaintiff with the defendant, under the following circumstances : —

¹ By act of Congress of July 2, 1890, contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce in the District of Columbia, or in any of the territories of the United States, or between any States and territories or foreign countries, are declared illegal and made criminal offences. 26 Stat. 202. And many States have enacted similar statutes. See *Eddy on Combinations*, II § 796 *et seq.*

The plaintiff, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called "Scientific Opinion," an advertisement in the following words: "The undersigned is willing to deposit 50*l.* to 500*l.* on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the United Kingdom to prove the rotundity and revolution of the world, from Scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to show visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346, Strand, and of Mr. W. Carpenter, of 7, Carlton Terrace, Lewisham Park, or, if they differed, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in showing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four miles, then a further period of one month is to be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was to be at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favor of Mr. Wallace, as having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the 500*l.* he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of 500*l.* to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agreement amounts in effect to a wager; and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, s. 18, is prevented from maintaining this action.

We will, in the first instance, proceed with the case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by the effect of the statutes of 16 Car. 2, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being made null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with the stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in *Hodson v. Terrill*, 1 Cr. & M. 797, notice had been given to the stakeholder prior to the event being determined, but also where, as in *Hastelow v. Jackson*, 8 B. & C. 221, notice was given after the event had come off.

In *Hodson v. Terrill*, 1 Cr. & M. 797, the deposit had been made on a cricket match for 20*l.* a side, and was therefore unlawful within the statute of Anne. A dispute having arisen in the course of the match,

and one side having refused to play it out, the plaintiff, who had paid a deposit, claimed to have it returned, and it was held that he was entitled to recover.

So in *Martin v. Hewson*, 10 Ex. 737, 24 L. J. (Ex.) 174, in an action for money had and received to plaintiff's use, the defendant having pleaded that the money had been deposited with him to abide the event of a cock-fight, the replication, that before the result was ascertained the plaintiff repudiated the wager, and required repayment of the deposit, was held good. In *Hastelow v. Jackson*, 8 B. & C. 221, the Court of Queen's Bench, following the prior cases of *Cotton v. Thurland*, 5 T. R. 405, *Smith v. Bickmore*, 4 Taunt. 474, and *Bate v. Cartwright*, 7 Price, 540, held that, where, money having been deposited with the stakeholder to abide the event of a boxing match, A., the depositor, claimed the whole sum from the stakeholder, as having won the fight, and threatened him with an action if he paid it over to B., the other combatant, which he nevertheless did by direction of the umpire, A. was entitled to recover the money he had deposited as his own stake as money had and received to his use. "If," says Bayley, J., "a stakeholder pays over the money without authority from the party and in opposition to his desire, he does so at his own peril." These cases have never been overruled, and must be considered as law; although in *Meaning v. Hellings*, 14 M. & W. at p. 712, Alderson, B., speaks doubtingly of the decision in *Hastelow v. Jackson*, 8 B. & C. 221, using the expression, "that case does not convince me, it overcomes me." But that case seems to have been decided more on the form of the particulars than anything else, and does not seriously interfere with the authority of *Hastelow v. Jackson*, 8 B. & C. 221, which seems to us to be good law.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager, and others, in which the wager, not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing, who can at any time claim it back before it has been paid over. In the latter, the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid, it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal; and the Courts of King's Bench and Exchequer were at variance on this point. In *Eltham v. Kingsman*, 1 B. & Ald. 683, the Court of King's Bench, consisting of Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ., held that even where a wager was legal, the authority of a stakeholder, who was also (as is the case with the present defendant) to decide between the parties, might be revoked and the deposit de-

manded back. "Here," says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man," says Abbott, J., "who has made a foolish wager may rescind it before any decision has taken place." In the later case of *Emery v. Richards*, 14 M. & W. 728, the Court of Exchequer, where money had been deposited on a wager of less than 10*l.* on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict., not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of *Eltham v. Kingsman*, 1 B. & Ald. 683, does not, however, appear to have been brought to the notice of the court, and in our view the decision of this court was the sounder one. We cannot concur in what is said in *Chitty on Contracts*, 8th ed., p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of *Eltham v. Kingsman*, 1 B. & Ald. 683, and *Hastelow v. Jackson*, 8 B. & C. 221; and in that view we concur.

Practically, however, it is now unnecessary to decide this question, if the transaction under consideration is to be looked upon as a wager. For by 8 & 9 Vict. c. 109, s. 18, it is enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action, — a question on which a difference of opinion exists. The question arose in *Varney v. Hickman*, 5 C. B. 271, 17 L. J. (C. P.) 102. The plaintiff and one Isaacs had deposited 20*l.* each with the defendant on the event of a match between two horses. Before the race was run the plaintiff gave notice to the defendant that he declined the bet and demanded back his deposit. The plaintiff not attending to contest the race, Isaacs was declared the winner, and the amount of the two deposits was handed over to him by the defendant. An action for money had and received having been brought by the plaintiff to recover the amount of his deposit, the statute

8 & 9 Vict. c. 109, s. 18, was relied on for the defence. But it was held by the court, consisting of Maule, Creswell, and Williams, JJ., that the part of s. 18 relating to deposits was meant to apply only to the non-recovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over.

In the later case of *Martin v. Hewson*, 10 Ex. 737; 24 L. J. (Ex.) 174, already referred to, the Court of Exchequer adopted the view of the Common Pleas in *Varney v. Hickman*, 5 C. B. 271; 17 L. J. (C. P.) 102, Parke, B., saying: "According to the context, the statute prohibits the recovery of money which has been won in such a transaction, or has been deposited to abide the event of a wager, but it does not apply to the case where a party seeks to recover his stake upon a repudiation of the wagering contract."

But in *Savage v. Madder*, 36 L. J. (Ex.) 178, Martin, B., expressed a decided opinion that no action could be brought either directly upon the contract, or in respect of money deposited by the winner himself in the hands of a stakeholder to abide the event. "It is," said the learned judge, "in fact, expressly within the act of Parliament; and more than that, it is within what the act intended to effect. The object of the act was to prevent trials in courts of law with respect to betting contracts; and rightly so, for they are contracts in relation to transactions with which the time of the courts of law ought not to be occupied. A man who makes bets must take his chance of getting his money. A bet ought to be a contract of honor; and if the loser cannot pay, no action should be maintainable in respect of the debt." What was thus said was, however, unnecessary to the decision of the question before the court. For the plaintiff there claimed the entire stakes as his by the event; he had never repudiated the wager or revoked the authority of the stakeholder. He was seeking to enforce the wager, and was met by the statute and defeated by the effect of the enactment. The question again arose directly in the case of *Graham v. Thompson*, Ir. Rep. 2 C. L. 64, in the Court of Common Pleas in Ireland, where, in an action for money had and received, the defendant pleaded specially, "that the money was money deposited in the hands of the defendant to abide an event on which a wager had thereupon been made, to wit, etc., and that that wager had not been repudiated, or any demand of the said money, or any part thereof, made upon him by the plaintiff before the event on which the said wager had been made had taken place, and the said wager had been decided." The plaintiff demurred to this defence, on the ground that it was consistent with it that the plaintiff had repudiated the wager before the defendant had paid over the money to the winner. And the court, taking the same view as had been taken in *Varney v. Hickman*, 5 C. B. 271, 17 L. J. (C. P.) 102, and *Martin v. Hewson*, 10 Ex. 737, 24 L. J. (Ex.) 174, held the demurrer good. It is unnecessary to say what our view might have been had the matter been *res integra*; we

are bound by the authority of these decisions, which, if they are to be reviewed, can only be reviewed in a court of appeal.

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favor the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the court in the cases of *Eltham v. Kingsman*, 1 B. & Ald. 683, and *Hastelow v. Jackson*, 8 B. & C. 221, before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer justified in paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

¹ *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; *Universal Stock Exchange v. Strachan*, [1836] A. C. 166; *Burge v. Ashley*, [1900] 1 Q. B. 744; *Lewis v. Bruton*, 74 Ala. 317; *Thornhill v. O'Rear*, 108 Ala. 299; *Hale v. Sherwood*, 40 Conn. 332; *Colson v. Meyers*, 80 Ga. 499; *Petillon v. Hipple*, 90 Ill. 420; *Burroughs v. Hunt*, 13 Ind. 178; *Adkins v. Flemming*, 29 Iowa, 122; *Pollock v. Agner*, 54 Kan. 618; *Hutchings v. Stilwell*, 18 B. Mon. 776; *McDonough v. Webster*, 68 Me. 530; *Fisher v. Hildreth*, 117 Mass. 558; *Morgan v. Beaumont*, 121 Mass. 7; *Whitwell v. Carter*, 4 Mich. 329; *Wilkinson v. Tousley*, 16 Minn. 263; *Pabst Brewing Co. v. Liston*, 80 Minn. 473; *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Deaver v. Bennett*, 29 Neb. 812; *Hoit v. Hodges*, 6 N. H. 104; *Hensler v. Jennings*, 62 N. J. L. 209; *Stoddard v. McAuliffe*, 81 Hun, 524, affirmed without opinion, 151 N. Y. 671; *Wood v. Wood*, 3 Murph. 172; *Forrest v. Hart*, 3 Murph. 458; *Dunn v. Drummond*, 4 Okla. 461; *Willis v. Hoover*, 9 Oreg. 418; *Conklin v. Conway*, 18 Pa. 329; *Dauler v. Hartley*, 178 Pa. 23; *McGrath v. Kennedy*, 15 R. I. 209; *Bledsoe v. Thompson*, 6 Rich. L. 44; *Guthman v. Parker*, 3 Head, 234; *Lillard v. Mitchell*, 37 S. W. Rep. (Tenn.) 702; *Lewy v. Crawford*, 5 Tex. Civ. App. 293; *West v. Holmes*, 26 Vt. 530, *acc.* See also *Shoolbred v. Roberts*, [1899] 2 Q. B. 560, [1900] 2 Q. B. 497; *Trenery v. Goudie*, 106 Iowa, 693; *Jones v. Cavanaugh*, 149 Mass. 124.

In a few States demand must be made upon the stakeholder before the wager has

THACKER v. HARDY.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL,
DECEMBER 7, 1878.

[Reported in 4 *Queen's Bench Division*, 685.]

THE plaintiff was a stock-broker and a member of the London Stock Exchange, and sued the defendant for commission and for an indemnity in respect of certain contracts into which he had entered, pursuant to instruction from the defendant. By his defence the defendant relied upon the provisions of 8 and 9 Vict. c. 109, s. 18, and alleged that the plaintiff had become a defaulter upon the Stock Exchange, but not by reason of his employment by the defendant. The cause came on for trial before Lindley, J., without a jury, who ultimately gave judgment to the following effect:—

LINDLEY, J. This action is brought by a broker against his principal for indemnity against liabilities incurred by the broker, in buying and selling stocks and shares upon the Stock Exchange for the defendant by his authority. The main defence is that the claim is founded upon gaming and wagering transactions, in respect of which no action can be brought. In order to decide the point thus raised, it is necessary to consider, first, the real nature of the agreement between the plaintiff and the defendant, and, secondly, how the law stands with respect to gaming and wagering transactions in stocks and shares. As regards the true nature of the agreement between the plaintiff and the defendant, the conclusions at which I have arrived are as follows: first, that the defendant was a speculator, and the plaintiff knew him to be so; secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange; thirdly, that the defendant knew, or must be taken to have known, that, in order to carry out the transactions, the plaintiff would have to enter into contracts to buy or sell, as the case might be, and in order to protect himself and the defendant, to enter into other contracts to sell or buy respectively; fourthly, that there was, in fact, no other way in which the plaintiff could speculate for the defendant as he desired; fifthly, that the plaintiff did buy and sell accordingly;

been decided. *Johnston v. Russell*, 37 Cal. 670; *Davis v. Holbrook*, 1 La. Ann. 176; *Hickerson v. Benson*, 8 Mo. 8; *Connor v. Black*, 132 Mo. 150, 154; *Sutphin v. Crozer*, 32 N. J. L. 257. But in Missouri and New Jersey this doctrine has been affected by statute. See *Weaver v. Harlan*, 48 Mo. App. 319; *White v. Gilleland*, 93 Mo. App. 310; *Hensler v. Jennings*, 62 N. J. L. 209.

If a stakeholder pays the winner, before receiving notice of repudiation of the

¹ Numerous decisions to this effect are collected in 14 *Am. & Eng. Encyc. of Law* (2d ed.), 609–611. In some jurisdictions contracts to sell in the future stock or merchandise which the seller did not own at the time of the contract are made illegal without reference to any intention that there shall be no delivery. See *Fortenbury v. State*, 47 Ark. 188; *Johnston v. Miller*, 67 Ark. 172; *Branch v. Palmer*, 65 Ga. 210;

sixthly, that the defendant never expected, nor intended, to accept actual delivery of what the plaintiff might buy for him, nor actually deliver what he might sell for him, and that the plaintiff knew that the defendant never expected or intended so to do; seventhly, that the defendant, nevertheless, knew that he incurred the risk of having to accept or deliver, as the case might be, but was content to run that risk, in the expectation and hope that the plaintiff would be able so to arrange matters as to render nothing but differences actually payable to or by him, as the case might be; eighthly, that unless the plaintiff could arrange matters as expected, the defendant would be unable to pay for what was bought from him or deliver what was sold for him, and that the plaintiff knew perfectly well that the defendant would be unable so to do.

I proceed next to examine the law applicable to transactions of this kind. The only statute in force and material to be noticed is 8 & 9 Vict. c. 109, s. 18, which, in effect, declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable. This act does not expressly mention or allude to Stock Exchange transactions; but it has been decided that agreements between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions within the meaning of the statute. *Grizewood v. Blane*, 11 C. B. 526; *Barry v. Croskey*, 2 J. & H. 1; and *Cooper v. Neil*, W. N. 1 June, 1878, all decide that. But the plaintiff did not agree to buy or sell from or to the defendant; and I have the authority of Brett, L. J., for saying that the statute only affects the contract which makes the bet or wager. The agreement between the plaintiff and the defendant rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect of these contracts he incurred obligations, for the non-performance of which actions could and can now be brought against him. It is against the liability so incurred that he seeks to be indemnified.

Upon general principles an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default. What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have

precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred. *Cannan v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 M. & W. 434; *Lyne v. Siesfeld*, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch v. Jones*, 5 E. & B. 238, is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange: *Oulds v. Harrison*, 10 Ex. 572; and if money be so paid by plaintiff at the request of a defendant, it can be recovered by action against him. *Knight v. Camber*, 15 C. B. 562; *Jessopp v. Lutwyche*, 10 Ex. 614; *Rosewarne v. Billing*, 15 C. B. (N. s.) 316; and it has been held that a request to pay may be inferred from an authority to bet. *Oldham v. Ramsden*, 44 L. J. (C. P.) 309. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action.

It was, however, suggested that, independently of that statute, the gambling here was of so pernicious a nature as to be illegal on grounds of public policy. That the defendant was a reckless speculator, and that the plaintiff knew it, I consider to be beyond all doubt; but it does not follow that what they did or aimed at was illegal. In one sense they were both gamblers; but care must be taken not to be misled by an epithet, and, in order to avoid ambiguity, I have already pointed out exactly what the real nature of their transactions was. Such gambling as this, however demoralizing and reprehensible, does not appear to me to be illegal, and my reasons for this opinion are as follows:—

It required a statute (7 Geo. 2, c. 8), to prevent gambling in the public funds; and notwithstanding the strong condemnation in the preamble of such gambling, the act itself was repealed in 1860 by 23 & 24 Vict. c. 28. Moreover, even when the act was in force, gambling in shares and foreign stocks was held not to be illegal, either under the act or at common law. Lord Tenterden, indeed, was of opinion that such gambling was illegal at common law. He said so in *Bryan v. Lewis*, R. & M. 386; but this opinion was declared erroneous in *Hibblewhite v. M'Morine*, 5 M. & W. 462. Under these circumstances I am unable to hold that the transactions engaged in by these parties were illegal, or that the purchases and sales made by the plaintiff were made in pursuance of or to attain an illegal object. This view is supported by the judgment of Brett, L. J., in *Cooper v. Neil*, W. N. 1 June, 1878; and by the case of *Ashton v. Dakin*, 7 W. R. 384.

In answer to the argument that a contract which is void and unenforceable cannot be made the foundation of an implied promise to indemnify, it appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that, in my view of the evidence, the defendant did authorize the plaintiff to incur liability by buying and selling as above described. I am unable to draw the inference which the jury drew in *Cooper v. Neil*, W. N. 1 June, 1878, namely, that the

plaintiff was instructed to make time bargains, and that he did in fact make such bargains. A real time bargain is, I suspect, a very rare occurrence. *Grizewood v. Blane*, 11 C. B. 526, affords an instance of one, and *Cooper v. Neil*, W. N. 1 June, 1878, as understood by the jury, afforded another. But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the Stock Exchange. For the above reasons I hold that the plaintiff is entitled to indemnity, notwithstanding the gambling nature of the transactions between himself and the defendant.

The defendant was himself unable to meet his engagements, and was the principal cause of the plaintiff's becoming a defaulter. The inability of the defendant to continue his speculations gave the plaintiff the right to close all the defendant's accounts; that appears from a celebrated case in Chancery, *Lacey v. Hill*, Law Rep. 8 Ch. 441 and 18 Eq. 182. Whether they were closed by the plaintiff or by the Stock Exchange committee, is, I think, immaterial, it not being proved that the defendant was in any way prejudiced by what was done. Consequently I give judgment for the plaintiff for the full amount claimed with costs.

The defendant appealed.

CORRON, L. J.¹ In my opinion this appeal fails. In dealing with this case we ought to consider what principle ought to be applied, without reference to the consequences of our decision; but I may add that by holding the defendant liable in this case we may do a good deal towards checking irregular transactions upon the Stock Exchange. It is not contended that if the findings are right the judgment is wrong, and I think that upon the findings the decision of Lindley, J., is clearly correct. I adhere to the opinion expressed by the members of the court in *Cooper v. Niel*, W. N. 1 June, 1878, and that opinion shows that the defence in the present action must fail. It was assumed by the counsel for the defendant that by the bargain between him and the plaintiff he was liable for only the difference, whatever should happen to the plaintiff; and it was contended that a contract of that kind would be null and void, as being against the provisions of 8 & 9 Vict. c. 109. I will assume that the plaintiff was in a certain sense acting as principal; nevertheless there was no gaming or wagering in the contract. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature; that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win. But that is not

¹ BRAMWELL and BRETT, L.JJ., delivered concurring opinions.

the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties.

It appears to have been imagined on behalf of the defendant that *Grizewood v. Blane*, 11 C. B. 526, showed that such a transaction as that before us is in the nature of gaming and wagering, and that no action can arise out of it. I cannot concur with that view. In that case, according to the findings of the jury, neither party intended that there should be an actual buyer and seller; it was simply a bargain that according to the price of stock on a future day the parties should respectively gain or lose. According to this finding there existed the essential element of wagering; each party was to gain or lose according to a subsequent event, and the transaction was a wagering contract. In form it was a contract for sale of stock, but it was really entered into in order to carry out a gambling transaction. I wish, however, to point out that some transactions in which the parties may gain or lose according to the happening of a future event are not within the provisions of 8 & 9 Vict. c. 109; for instance, the sale of next year's apple crop is a transaction in which at a future time the parties may be respectively gainers or losers, according to the happening of the event; but the essential element of a wagering contract is wanting. It has been contended that upon the facts proved the proper inference to be drawn is that a wagering contract has been entered into. I cannot assent to this contention. The contract was simply this: the defendant authorized the plaintiff as his agent to enter into contracts for the purchase of stock, of such an amount that the parties must have known that the defendant did not intend to take it up, but that he meant to arrange matters in another way. I do not think that this transaction is avoided by the statute against gaming and wagering. In *Grizewood v. Blane*, 11 C. B. 526, the Court of Common Pleas was of opinion that, upon the facts found, the transaction between the parties was in truth a wagering contract; but it is to be remarked the jury might have come to a different conclusion; and, judging by what I know as to the mode of doing business upon the Stock Exchange, I think that it is not easy to justify the verdict in *Grizewood v. Blane*, 11 C. B. 526. But at all events it is very distinguishable from the present case. In *Grizewood v. Blane*, 11 C. B. 526, the plaintiff, being a jobber, pretended to buy from, or sell to, the defendant; here the plaintiff bought and sold for the defendant.

Judgment affirmed.

JOHN S. HOPKINS, RECEIVER OF LAUGHLIN AND McMANUS,
v. ARTHUR O'KANE, APPELLANT.

PENNSYLVANIA SUPREME COURT, APRIL 1-JULY 18, 1895.

[Reported in 169 *Pennsylvania State*, 478.]

RULE to open judgment.

From the depositions taken in support of the rule, it appeared that in November, 1892, defendant directed Laughlin and McManus, brokers, to purchase two hundred shares of Reading Railroad stock, for which he paid in full. The brokers received and retained the certificate for the stock, and in December, 1892, at defendant's request resold the stock and retained the proceeds. Subsequently defendant directed the brokers to purchase shares of a traction company, and these in turn were sold by the brokers, and the proceeds retained by them. Similar transactions took place until on February 28, 1893, when defendant was indebted to Laughlin and McManus in the sum of \$2,000, for which the judgment note in suit was given. Judgment was entered upon the note by the receiver of the firm of Laughlin and McManus, and subsequently defendant obtained a rule to open the judgment on the ground that the debt grew out of gambling transactions.

The Court discharged the rule, and defendant appealed.

Error assigned was above order.

Opinion by MR. JUSTICE MITCHELL, July 18, 1895:

There is nothing in this case which would justify disturbing the judgment. It ought not to be necessary to say again after *Peters v. Grim*, 149 Pa. 163, and other cases, that a purchase of stocks on margin is not necessarily a gambling transaction. (Stocks may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. "Margin" is security, nothing more, and the only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions to ascertain their true character. If they are real purchases and sales, they are not gambling though they are done partly or wholly on credit.

The appellant himself testified that the first transaction involved in this case was his purchase of two hundred shares of Reading. "I bought them outright," and paid for them. Shortly afterwards he sold them, and on his order, the brokers bought Traction stock, and retained the proceeds of the Reading as part payment for it. The subsequent transactions were of the same character, actual purchases and sales in which the stocks bought were received by the brokers for defendant, and those sold delivered by them for him to the purchasers. There was all the time on the broker's book a standing

credit to appellant of the money received on his account from the sale of the Reading stock, and the subsequent debits and credits for the later purchases and sales. The account closed unfortunately for appellant with a balance against him, but there is no allegation, certainly no evidence, that it was not correct.

*Judgment affirmed.*¹

WILLIAM P. HARVEY AND OTHERS v. Z. TAYLOR
MERRILL AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 5, 1889 —
SEPTEMBER 5, 1889.

[Reported in 150 Massachusetts, 1.]

CONTRACT to recover for losses incurred by the plaintiffs, in the purchase and sale of pork on the Chicago board of trade for the defendants, and for their commissions as brokers. The case was referred to an auditor, who made a report, which, so far as material, is as follows: —

The plaintiffs were commission merchants and brokers, dealing in provisions and grain as members of the board of trade in the city of Chicago. The defendants were brokers in the city of Boston, who forwarded orders for the purchase and sale of pork, upon contracts for future delivery, to the plaintiffs, who entered into contracts of purchase and sale for future delivery in their own name, but for account of the defendants, the defendants promising to pay them a commission for the execution of such orders, and to reimburse them for any expenses or losses which should be incurred in the final settlement. This action is brought to recover for commissions in the execution of such orders, and for the loss, being the difference between the contracts of purchase which the plaintiffs made on behalf of the defendants and the sales of the same quantity of pork for the same account.

The defendants gave the orders, and the plaintiffs made the contracts. There was a rapid decline in the market shortly after the contracts for purchases were made, in consequence of which, when the contracts for sales were made, there was a loss of about twenty thousand dollars, which the plaintiffs have paid and have suffered.

¹ Universal Stock Exchange v. Stevens, 66 L. T. n. s. 612; Forget v. Ostigny, [1895] A. C. 318; Union Nat. Bank v. Carr, 15 Fed. Rep. 438; Clews v. Jamieson, 182 U. S. 461; Hatch v. Douglas, 48 Conn. 116; Skiff v. Stoddard, 63 Conn. 198; Corbett v. Underwood, 83 Ill. 324; Oldershaw v. Knowles, 101 Ill. 117; Perin v. Parker, 126 Ill. 201; Fisher v. Fisher, 113 Ind. 474; Sondheim v. Gilbert, 117 Ind. 71; Ball v. Campbell, 30 Kan. 177; Sawyer v. Taggart, 14 Bush. 727; Durant v. Burt, 98 Mass. 161; Bullard v. Smith, 139 Mass. 492; Bingham v. Scott, 177 Mass. 208; Clay v. Allen, 63 Miss. 426; Stenton v. Jerome, 54 N. Y. 480; Gruman v. Smith, 81 N. Y. 25; Minor v. Beveridge, 141 N. Y. 399; Taylor's Estate, 192 Pa. 304, 309, 313; Smyth v. Field, 194 Pa. 550; Winward v. Lincoln, 23 R. I. 476, acc.

But by statute contra in California, Cashman v. Root, 89 Cal. 373; Wetmore v. Barrett, 103 Cal. 246; Sheehy v. Shinn, 133 Cal. 325; Rued v. Cooper, 119 Cal. 463; Parker v. Otis, 130 Cal. 322.

It was the custom in such dealings for persons in the situation of the plaintiffs to require a deposit of a margin, unless the person executing the orders was content to rely upon the pecuniary responsibility of the person giving such orders, and there was a customary margin of a dollar a barrel on pork at that time in these transactions made on the Chicago board of trade. A draft of one thousand dollars was sent on May 28, 1883, and credited as a margin, and another sum of three thousand dollars as a margin was sent by the defendants about July 2, in response to a request from the plaintiffs for the same.

The principal ground of defence was that these contracts were made upon the mutual understanding that no delivery of the merchandise was intended or expected, but that, by a series of offsetting contracts of sales for future delivery of the same kind of merchandise, settlements were to be made by the payment of the difference in price, according to the state of the market as it should rise or fall, and that the contracts were merely a device to enable the parties to make, in effect, wagers upon the probable rise or fall in the market, and thus to gamble upon the chance of such advance or decline in prices.

It was well understood by the parties, both plaintiffs and defendants, that, though the contracts in form called for and required an express delivery of the pork purchased and sold, yet the parties intended and contemplated only transactions by formal contracts, which should be set off one against the other, to avoid the necessity of ever receiving or delivering a single barrel of pork, and that the transactions were to be adjusted and settled solely upon those differences which the chances of the rise and fall of the market should create. These contracts were to be executed in Chicago, and were clearly governed by the law of Illinois; and, at the time they were made, a statute was there in force which declared that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, . . . shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Rev. Sta. of Ill. of 1874, c. 38, § 130.¹

The terms of these contracts did not give the parties an option to sell or buy at a future time this pork; they were contracts to be fulfilled by the delivery of the pork in a future month; and were not such options as are forbidden by the statute. The auditor based his finding as to the invalidity of the contracts upon the fact that, though the parties

¹ See as to the construction of this statute, *Wolcott v. Heath*, 78 Ill. 433; *Logan v. Musick*, 81 Ill. 415; *Schneider v. Turner*, 130 Ill. 28; *Ames v. Moir*, 130 Ill. 582; *Corcoran v. Lehigh Coal Co.*, 138 Ill. 390; *Preston v. Smith*, 156 Ill. 359. Compare *Wolf v. National Bank of Illinois*, 178 Ill. 85; *Schlee v. Guckenheimer*, 179 Ill. 593; *Ubber v. Binnian*, 182 Ill. 508; *Loeb v. Stern*, 198 Ill. 371.

Unless forbidden by statute a contract of option is valid. *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438; *Hanna v. Ingram*, 93 Ala. 482; *Godman v. Meixsel*, 65 Ind. 32; *Mason v. Payne*, 47 Mo. 517; *Pieronnet v. Lull*, 10 Neb. 457; *Bigelow v. Benedict*, 70 N. Y. 202; *Harris v. Turnbridge*, 83 N. Y. 93; *Lester v. Buel*, 49 Ohio St. 240, 252; *Kirkpatrick v. Bonsall*, 72 Pa. 155.

made express contracts for the purchase of several thousand barrels of pork in June and July, to be delivered in August and September, yet it was well understood between the parties that actual deliveries were not to be made, but such deliveries were to be avoided by the device of making equivalent contracts for the sale of an equal number of barrels of pork deliverable in the same months, and then by making a direct settlement by a set-off of these opposite contracts, and by paying or receiving the difference created by the rise or fall in the market prices. According to the rules of the board of trade, and according to the terms of the contracts made, the purchaser could exact the delivery of the article, and he could not be required to settle by an offsetting contract; and a seller could likewise insist upon a delivery and payment of the money, and not be required to settle by an offsetting contract. In a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts; (and in every instance such was the mode of dealing between the plaintiffs and the defendants.)

The defendants did not deal in these articles of merchandise by the actual receipt and delivery of the same, and never have done so. They had no facilities to handle them by actual receipt and delivery; they had no warehouses; the customers for whom they acted appeared to be residents of Lawrence, in this Commonwealth, and there was no disclosure of any circumstance indicating any facilities on the part of these customers for the receipt, storage, or delivery of such a quantity of these commodities as the defendants ordered to be bought and sold. In a period of two months the defendants ordered purchases of above fifteen thousand barrels of pork, at an aggregate cost of about two hundred and fifty thousand dollars; they also bought large quantities of lard, wheat, corn, and ribs; and the aggregate of the purchases was between four and five hundred thousand dollars, and they were nearly all made within the thirty days following June 11, 1883. In the same period they sold the same quantity of pork, lard, wheat, corn, and ribs as was purchased, with a net loss of between twenty and twenty-five thousand dollars. [No warehouse receipt, no bill of lading, and no item of storage appears to have been created in any of these transactions.]

The plaintiffs rendered to the defendants an account covering all their transactions, which exhibited a balance due from the defendants to the plaintiffs.

The auditor found for the defendants, solely on the ground that, under the guise of the contracts above described, the real intent was to speculate on the rise and fall of prices, and not to receive or deliver the actual commodities, and therefore that the contracts were wagers; but if his finding in this respect should be incorrect, he found that the plaintiffs were entitled to recover such balance with interest.

The auditor filed a supplemental report, which contained the following statement:—

“The contracts made between members of the board of trade appear, upon the evidence before me, to be valid obligations, some of which, it appears, are executed by actual deliveries; and there was no evidence

before me that any ear-mark or distinctive feature of any of the contracts so made existed, by which the majority that were to be set off and cancelled without delivery of merchandise could be distinguished from the minority, in which actual delivery was made. . . . My finding relates to the understanding between the plaintiffs and the defendants, and my conclusion is unchanged that the parties to this suit entered into the dealings with each other, which are the subject thereof, with a clear understanding that actual deliveries were not contemplated, and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case. If it is material, I do not find such an understanding to have been proved."

At the trial in this court, the reports of the auditor were the only evidence introduced by either party, and Holmes, J., declined to submit the case to the jury, or to direct a verdict for the defendants, as requested by them; but instructed the jury that the plaintiffs were entitled to a verdict upon the auditor's report.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

R. M. Morse, Jr. and *W. S. Knox*, for the defendants.

E. W. Hutchins and *H. Wheeler*, for the plaintiffs.

FIELD, J. The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. We cannot take notice of the statutes of Illinois, except so far as they are set out in the auditor's report; and the auditor has set out but one statutory provision of that State, and has found that the parties have not acted in violation of that. We are therefore to determine whether the contract between the parties, as the auditor has found it to be, is illegal and void by the common law of Massachusetts.

It is not denied that, if, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract.¹ If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference

¹ Numerous decisions to this effect are collected in 14 Am. & Eng. Encyc. of Law (2d ed.), 609-611. In some jurisdictions contracts to sell in the future stock or merchandise which the seller did not own at the time of the contract are made illegal without reference to any intention that there shall be no delivery. See *Fortenbury v. State*, 47 Ark. 188; *Johnston v. Miller*, 67 Ark. 172; *Branch v. Palmer*, 65 Ga. 210;

between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

The construction which we think should be given to the auditor's report is, that he finds that the contracts which the plaintiffs made on the board of trade with other members of that board were not shown to be wagering contracts, and that the contract which the defendants made with the plaintiffs was, that the defendants should give orders from time to time to the plaintiffs for the purchase and the sale on account of the defendants of equal amounts of pork to be delivered in the future; that the plaintiffs should, in their own names, make these purchases and these sales on the board of trade; that the plaintiffs should, at or before the time of delivery, procure these contracts to be set off against each other, according to the usages of that board; that the defendants should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be required to pay to the plaintiffs, and should only be entitled to receive from them, the differences between the amounts of money which the pork was bought for and was sold for; and that the defendants should furnish a certain margin, and should pay the plaintiffs their commissions.

The defendants gave orders in pursuance of this contract; the plaintiffs made the purchases and sales on the board of trade, set them off against each other, and now sue the defendants for the differences which they have paid and for their commissions.

The auditor has found that, "in a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts." In his supplemental report he says, "My conclusion is unchanged, that the parties to this suit entered into the dealings with each other which are the subject thereof with a clear understanding that actual deliveries were not contemplated and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other is not material to the issue of this case."

The peculiarity of this case, according to the findings of the auditor, is, that while the contracts which the plaintiffs made on the board of trade must be taken to be legal, the plaintiffs have undertaken to agree with the defendants that these contracts should not be enforced by or

Moss v. Exchange Bank, 102 Ga. 808; *Singleton v. Bank of Monticello*, 113 Ga. 527; *Lemonius v. Mayer*, 71 Miss. 514; *Dillard v. Brenner*, 73 Miss. 130; *Violet v. Mangold*, 27 So. Rep. (Miss.) 875; *Connor v. Black*, 119 Mo. 126, 132 Mo. 150; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Staples v. Gould*, 9 N. Y. 520; *Gist v. Western Union Tel. Co.*, 45 S. C. 344; *Riordan v. Doty*, 50 S. C. 537; *Saunders v. Phelps Co.*, 53 S. C. 173.

against them, except by settlements according to differences in prices. If such an agreement seems improbable, it is enough to say that the auditor has found that it was made. The usages of the board of trade were such that the plaintiffs might well think that they risked little or nothing in making such an agreement. Indeed, the distinction in practice between the majority of contracts which by the auditor's report appear to be made and settled on the board of trade, and wagering contracts, is not very plain, and brokers, for the purpose of encouraging speculation and of earning commissions, might be willing to guarantee to their customers that the contracts made for them on the board of trade should not be enforced, except by a settlement, according to differences in prices.

We do not see why the agreement between the plaintiffs and the defendants, that the defendants should not be required to receive or deliver merchandise, or to pay for or receive pay for merchandise, but should be required to pay to and to receive from the plaintiffs only the differences in prices, is not, as between the parties, open to all the objections which lie against wagering contracts. On the construction we have given to the auditor's report, the plaintiffs, in their dealings with the defendants, in some respects acted as principals. In making the contracts on the board of trade with other brokers, they may have been agents of the defendants. In agreeing with the defendants that they should not be compelled to perform or accept performance of the contracts so made, the plaintiffs acted for themselves as principals. If the defendants had made a contract with the plaintiffs to pay and receive the differences in the prices of pork ordered to be bought and sold for future delivery, with the understanding that no pork was to be bought or sold, this would be a wagering contract. On such a contract the defendants would win what the plaintiffs lose, and the plaintiffs would win what the defendants lose. But so far as the defendants are concerned, the contracts which the auditor has found they made with the plaintiffs are contracts on which they win or lose according to the rise or fall in prices, in the same manner as on wagering contracts. If the plaintiffs, by virtue of the contracts they made with other members of the board of trade, were bound to receive or deliver merchandise, and to pay or receive the price therefor, on the auditor's finding they must be held as against the defendants to have agreed to do these things on their own account, and that the defendants should only be bound to pay to them and to receive from them the differences in prices. If the defendants, as undisclosed principals, should be held bound to other members of the board of trade on the contracts made by the plaintiffs, the plaintiffs by the terms of their employment would be bound to indemnify the defendants, except so far as the contracts were settled, by a payment of differences in prices. The agreement of the parties, as the auditor has found it, excludes any implied liability on the part of the defendants to indemnify the plaintiffs, except for money paid in the settlement of differences in prices. The position of the plaintiffs towards the defendants is no better than it would have been if the plaintiffs had been employed to make wagering contracts for pork on

account of the defendants, and had made such contracts, because the plaintiffs, relying upon the usages of the board of trade, have undertaken to agree with the defendants that whatever contracts they make shall bind the defendants only as wagering contracts, and shall be settled as such.

The plaintiffs contend that, even if the contracts which the defendants authorized them to make and which they made on the board of trade had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants.

In *Thacker v. Hardy*, 4 Q. B. D. 685, the court found that the plaintiff was employed to make lawful contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 & 9 Vict. c. 109, § 18. Lindley, J., in giving the opinion at the trial, said, at p. 687: "What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged." Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a court of law, any indemnity from the defendant in respect of the liabilities he had incurred. *Cannan v. Bryce*, 3 B. & Ald. 179; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Lyne v. Siesfield*, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch v. Jones*, 5 E. & B. 238, is plain to that effect." On appeal, Brett, L. J., said, at p. 694: "It was further suggested in *Cooper v. Neil*, W. N., 1 June, 1878, that the agreement was, that although the plaintiff, being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon the Stock Exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 & 9 Vict. c. 109, § 18, but I thought that there was no evidence of it. And with respect to the present action, I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England, wagering contracts concerning stocks or merchandise are not illegal at common law, and all the judges in *Thacker v. Hardy* were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In *Irwin v. Williar*, 110 U. S. 499, 510, the Supreme Court of the United States says of wagering contracts: "In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (*Thacker v. Hardy*, *ubi supra*), while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. *Dickson's Executor v. Thomas*, 97 Penn. St. 278; *Gregory v. Wendell*, 40 Mich. 482; *Lyon v. Culbertson*, 83 Ill. 33; *Melchert v. American Union Telegraph Co.*, 3 McCrary, 521; s. c. 11 Fed. Rep., 193 and note; *Barnard v. Backhaus*, 52 Wis. 593; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Saloman*, 71 N. Y. 420; *Love v. Harvey*, 114 Mass. 80." In considering how far brokers would be affected by the illegality of contracts made by them, that court says: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." This was decided in *Embrey v. Jemison*, 131 U. S. 336. See also *Kahn v. Walton* (Ohio, 1888), 20 N. E. Rep. 203; *Cothran v. Ellis*, 125 Ill. 496; *Fareira v. Gabell*, 89 Penn. St. 89; *Crawford v. Spencer*, 92 Misso. 498; *Lowry v. Dillman*, 59 Wis. 197; *Whitesides v. Hunt*, 97 Ind. 191; *First National Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41; *Rumsey v. Berry*, 65 Maine, 570.

It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. *Bishop v. Palmer*, 146 Mass. 469; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. *Embrey v. Jemison*, 131 U. S. 336, *ubi supra*, and the other cases there cited.¹

We are of opinion that the instruction of the presiding justice, that

¹ *Phelps v. Holderness*, 56 Ark. 300; *Nat. Bank of Augusta v. Cunningham*, 75 Ga. 366; *Pope v. Hanke*, 155 Ill. 617; *People's Savings Bank v. Gifford*, 108 Iowa, 277; *Rogers v. Marriott*, 59 Neb. 759, *acc.*

on the auditor's report the plaintiffs were entitled to a verdict, cannot be sustained. Whether on the auditor's report the defendants were entitled to a ruling directing the jury to render a verdict in their favor, or whether the case should have been submitted to the jury for the reasons stated in *Peaslee v. Ross*, 143 Mass. 275, is a question which has not been carefully argued, and upon which we express no opinion.

Exceptions sustained.

BENJAMIN F. PIXLEY ET AL. v. CHARLES W. BOYNTON ET AL.

ILLINOIS SUPREME COURT, SEPTEMBER TERM, 1875.

[Reported in 79 Illinois, 351.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action of assumpsit, brought by Charles W. Boynton, George S. Foster, and John S. Miller, partners, against Benjamin F. Pixley, Thomas W. Hall, and Joseph G. Hall, partners, upon a promissory note. The opinion of the court contains a statement of the material facts.

Mr. Farlin Q. Ball, for the appellants.

Messrs. Prentiss & Hooke, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the court:—

The judgment in favor of plaintiffs in the court below was for \$31.33 in excess of the *ad damnum* in the declaration. That sum had been remitted in this court by plaintiffs before the cause was submitted for decision. Under our present statute this is permissible, and is in accordance with the practice that prevails.

The action is upon a promissory note, and defendants seek to avoid the payment on the ground the consideration is illegal. The special defence set up in the notice filed with the general issue is, that it was given in settlement of "differences" arising out of an optional contract in wheat, made on the board of trade, and that it was not the intention of any of the parties to the transaction to buy or sell, or deliver or receive grain, but their only purpose was to trade in "differences" in the price of grain on the Chicago market.

It will not be necessary to discuss the legal proposition, that such contracts are void, as being against a sound public morality, for the reason we do not think any such contract as defendants insist upon has been proven to have existed between the parties. The burden of proof is upon defendants to show the consideration of the note is illegal, and they ought, in a case like this, to be required to make this proof by a clear preponderance of the evidence. This they have not done.

The contract was made by Hall, one of the defendants, on behalf of Wallace, who was not himself a member of the board of trade, and could not by its usages make contracts in his own name in relation to transactions on 'change. In June, 1870, Wallace, through Hall, sold

appeal of \$31.33 from circuit court.

The contract was made by Hall, one of the defendants, on behalf of Wallace, who was not himself a member of the board of trade, and could not by its usages make contracts in his own name in relation to transactions on 'change.

to Boynton, for his firm, 5,000 bushels No. 2 spring wheat, at \$1.12 per bushel, "seller July." Suddenly the price of wheat went up, and it was thought best to close up the matter. Accordingly, Hall, at the instance perhaps of Wallace, certainly in his interest, bought the wheat back from Boynton at an advance of fourteen cents per bushel. Neither Hall nor his firm had any real interest in the wheat, but as Hall and Boynton were both members of the board of trade, and as the contract was made in Hall's name, by his consent, and he was legally obligated to perform it, he would have been expelled had he not, in some satisfactory manner, closed up the matter with Boynton at the maturity of the contract. It was no doubt for this reason, as well as his legal liability, his firm gave the note upon which this action was brought.

A number of witnesses familiar with the rules of the board of trade were examined, and they all say this contract was in conformity with the custom of trade, and was a regular and legitimate contract. "Seller" the month, as that term is understood and used on the board of trade, is explained to mean the seller has until the last day of the month in which to make a delivery of any grain contracted to be sold. Under such a contract as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions.

One witness says, the true idea of an "option" is "puts" and "calls." A "put" is defined in the evidence to be "a privilege of delivering or not delivering the grain," and a "call" is "a privilege of calling or not calling for the grain." The contract between the parties to this transaction was not an optional one, in the sense of "puts and calls." The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period.

Whatever may have been the intention of Hall or Wallace, it seems clear that Boynton understood he was to have the grain at the maturity of the contract. His good faith was manifested, in that, immediately upon selling the grain back to Hall, for Wallace, he purchased a like amount at the price he had just sold, and upon the maturity of the contract, took the wheat and paid for it. Plaintiffs were extensively engaged in shipping grain, as shown by the testimony. Boynton emphatically declares this was not a gambling transaction, so far as he was concerned, but that the grain was purchased in good faith for the legitimate purposes of commerce. There is nothing in the record to overcome his testimony in this regard.

The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

A *remittitur* having been entered, there is now no error in the record, and the judgment will be affirmed to the extent of \$1000. But because there was error in the record before the *remittitur* was entered, all costs accruing in this court up to the date of entering the *remittitur* and the costs of entering the same, will be taxed against appellees.

*Judgment affirmed.*¹

WINCHESTER v. NUTTER & ANOTHER.

NEW HAMPSHIRE SUPREME COURT, DECEMBER, 1872.

[Reported in 52 *New Hampshire*, 507.]

ASSUMPSIT, by Cummings M. Winchester against Oscar Nutter and Elden Farnham, upon an account annexed, "for furnishing twenty-four suppers, at your request, at seventy-five cents each, price agreed, \$18." It appeared, in evidence, that the plaintiff and two defendants and several others met one evening at a schoolhouse in Lancaster, for the purpose of considering the subject of having a squirrel hunt in that neighborhood. The plaintiff was chosen chairman of the meeting. The two defendants were chosen as the leaders of the two opposite sides, called "captains," and accepted that place. They then chose sides, each captain selecting his men alternately, until there were twelve on each side, including the captains. They agreed to have a squirrel hunt, the hunting to begin and close at a fixed time, — after the close of which the game was to be counted according to certain prescribed rules, and the side that got beat was to pay for the suppers for both sides, it being arranged that, in the end, the captains should pay no more than each other man on his side; that each man on the side that got beat should pay for his own supper and for that of one man on the side that beat. The question submitted to the jury was as to what was the contract made with the plaintiff, who agreed to furnish the suppers for the whole. The jury found that the contract was that the two captains (the defendants) engaged the suppers, and were to be responsible to the plaintiff for the whole of them, and the matter was to be afterwards adjusted between the captains and their men. It appeared that the plaintiff knew and understood fully all these arrangements as to how the supper was to be paid for in the end.

¹ *Clarke v. Foss*, 7 Biss. 540; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Hentz v. Jewell*, 20 Fed. Rep. 592; *Bennett v. Covington*, 22 Fed. Rep. 816; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Lehman v. Feld*, 37 Fed. Rep. 852; *Hill v. Levy*, 98 Fed. Rep. 94; *Logan v. Musick*, 81 Ill. 415; *Scanlon v. Warren*, 169 Ill. 142; *Vigel v. Gatton*, 61 Ill. App. 98; *Whitesides v. Hunt*, 97 Ind. 191; *Sondheim v. Gilbert*, 117 Ind. 71; *Murry v. Ocheltree*, 59 Iowa, 435; *Sawyer v. Taggart*, 14 Bush, 727; *Rumsey v. Berry*, 65 Me. 570, 573; *Dillaway v. Alden*, 88 Me. 230; *Barnes v. Smith*, 159 Mass. 344; *Davy v. Bangs*, 174 Mass. 238; *Gregory v. Wendell*, 40 Mich. 432; *Donovan v. Daiber*, 124 Mich. 49; *Clay v. Allen*, 63 Miss. 426; *Cockrell v. Thompson*, 85 Mo. 510; *Crawford v. Spencer*, 92 Mo. 498; *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516; *Deierling v. Sloop*, 67 Mo. App. 446; *Rogers v. Marriott*, 59 Neb. 759; *Amsden v. Jacobs*, 75 Hun, 311; *aff'd without opinion*, 148 N. Y. 762; *Dows v. Glaspel*, 4 N. Dak. 251, *acc.*

The defendants moved the court to nonsuit the plaintiff, upon the ground that this whole transaction was simply a bet or wager for the suppers, and that the plaintiff's claim in this case "grows out of such bet or wager," under the provisions of ch. 254, sec. 12, Gen. Stats. The court, *pro forma*, overruled this motion, and the defendants excepted.

The question of law thus raised was reserved.

Fletcher & Heywood and *E. Fletcher*, for the defendants.

Ray & Drew and *G. A. Bingham*, for the plaintiff.

FOSTER, J. The plaintiff furnished, sold, and delivered to the defendants, at their special request, twenty-four suppers; why should not the defendants pay for them, there being no controversy about the price or the quality of the article furnished?

The plaintiff has fully performed his part of the contract; why should not the defendants perform their part?

Because, they say, that although they have received and eaten the plaintiff's suppers, still those suppers were provided in order to enable certain parties to pay a bet or wager; therefore, the contract for the purchase and sale of these suppers grew out of a bet or wager; and such a contract, they contend, is illegal and void, and in any effort to enforce it, *potior est conditio defendentis*.

If this contract is held void, it can only be on the ground that the wager was illegal, — a violation of law; and that the plaintiff, by contracting to furnish the suppers absolutely, whatever might be the result of the squirrel hunt, for a certain price and payment, absolute and unconditional, to these two defendants, whether they or the party that either one of them represented should be defeated or not in the event of the hunt, aided, abetted, counselled, hired, or procured the commission of a crime or a misdemeanor.

At common law, some contracts of wager are valid and some are void. 2 Pars. on Con. 627, 755. But the common law, allowing actions to be maintained upon a wager in cases not contrary to public policy nor prohibited by statute, has never been adopted in New Hampshire.

Here all wagers are void contracts. *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104. This is not because the contract is to commit or be accessory to a crime or a misdemeanor, for a wager contract is neither a crime nor a misdemeanor. Mere betting, unconnected with a criminal offence, is no offence against the criminal law. Neither the common law nor any statute of this State affixes any penalty to betting, as a criminal offence, or in any respect a misdemeanor.

The plaintiff presided at the meeting at which the arrangements for the hunt and for the subsequent suppers were made. He knew and understood fully all these arrangements. And so he may be said to have aided and abetted the transaction. But as the wager was not a misdemeanor, the plaintiff, in aiding the wager, did not aid a misdemeanor.

Here was no offence against the common law. How is the transaction to be viewed in the light of our statutes, and how is it affected by them? The wager contract is simply a void contract.

Section 12 of ch. 254, Gen. Stats., provides that "all bets and wagers, upon any question where the parties have no interest in the subject except that created by the wager, are void; and either party may recover any property by him deposited, paid or delivered upon such wager or its loss, and repel any action brought for anything the right or claim to which grows out of such bet or wager."

The contract of wager, then, as between the parties to that contract, the winning and losing parties in the result of the hunt, was a void contract. But it was not void as being an undertaking to violate the law, nor as an undertaking involving any violation of law punishable by a penalty as an offence against the criminal law.

The criminal law does not prohibit the contract. The criminal law is not violated by it. The criminal law affixes no penalty to the making or execution of the contract. The contract is in no way connected with a violation of the criminal law, for betting is not a violation of the criminal law.

Therefore, the doctrine of *particeps criminis* does not arise, and cannot be applied, because there is no *crimen*; no statutory nor common law offence, no municipal regulation nor ordinance, — nothing but a special statute imposing no penalty by virtue of any criminal process or proceeding, and not declaring a wager to be a misdemeanor, but merely denying a civil remedy and annulling a contract upon grounds of supposed public policy.

What is the public policy? Probably to restrain the tendency to idleness and improvidence, which is likely to be promoted by indulgence in the habit of betting. But public policy has not seemed to require that such amusements should be punished as a crime or misdemeanor, nor even that they should be so much as forbidden by the language of the law. The act of betting and the contract of wager is, therefore, neither *malum in se*, nor *malum prohibitum*, in the eye or the letter of the law.

Furthermore, as to the public policy, then, of the special statute referred to, which only renders the contract of wager void, its purpose and intent may be gathered from an additional part of the statute; for a subsequent section of the same chapter — section 14 — furnishes a definition of the terms "bet" or "wager," as employed in the previous section. "Any contract or agreement for the purchase, sale, loan, payment, or use of money or property, real or personal, the terms of which are made to depend upon, or are to be varied or affected by, any uncertain event in which the parties have no interest except that created by such contract or agreement, shall be deemed a bet or wager."

Now, it seems very clear that the idea of the special statute, section 12, is to declare void and to annul all contracts, the consideration or performance of which depends upon such an uncertain event as is mentioned in section 14, — that is, where one party's consideration, to be furnished, and the other party's performance or payment is to be furnished or made, according as such uncertain event may happen; in other words, where the contract is to be performed if the uncertain

event happen, and not to be performed if it does not happen, or *vice versa*.

The statute, then, evidently applies to a party to the transaction, and under its provisions the losing party may successfully resist an action to recover the money or value of the thing forfeited by the terms of the wager, or any action to recover damages for the non-performance of any act stipulated to be done, or for the omission of performance of any act stipulated not to be done, or indeed any action founded upon anything growing out of the wager.

And this immunity from liability would probably attach to any person, not directly a party to the wager, who might be so identified with the transaction as that his cause, claim, or rights should grow out of and depend upon the uncertain event which was the subject of the wager.

But, as between the parties to this suit, there was no element of uncertainty involved in *their* contract. The defendants contracted with the plaintiff that he should furnish for them twenty-four suppers, at seventy-five cents each, upon their credit. They agreed to pay for them. This was the whole of the contract. Their own reimbursement was to be regulated independently of their contract with the plaintiff. He was not to gain or lose by the success or the defeat of either party. The consideration for the defendant's promise was the suppers, which the two defendants were to have and dispose of as they might see fit. They might eat the twenty-four suppers themselves, or give them to their dogs. They were to receive so much food, absolutely and at all events. They, and only they, were to pay the plaintiff for it, absolutely and at all events. There was no element of uncertainty on either side of this contract.

It is said that the money lent for the purpose of betting cannot be recovered by the lender of the borrower: *Peck v. Briggs*, 3 Denio. 107; *Ruckman v. Bryan*, id. 340: 2 Par. on Cont. 756, note *k*; but that depends entirely upon the question whether the wager was a crime or a misdemeanor, or a contract connected with a violation of law.

So, a note given for money knowingly lent to be applied for the suppression of a prosecution for crime is void: *Plumer v. Smith*, 5 N. H. 553; but, by Richardson, C. J., "it is most unquestionably illegal, in a private individual, to suppress a criminal prosecution."

A bet upon the result of a squirrel hunt is, most unquestionably, not a violation of any law of this State.

The defendants' exception is therefore overruled, and their motion for a

Nonsuit denied.

WILLIAM S. FERGUSON v. ALLEN COLEMAN.

SOUTH CAROLINA COURT OF APPEALS, SPRING TERM, 1846.

[Reported in 3 Richardson (Law), 99.]

This was an action on an instrument, dated 31st January, 1843, whereby the defendant promised "to pay on the first of January, 1844.

to W. S. Ferguson or bearer, nine hundred and two dollars, fifty-eight cents, if cotton should rise to eight cents by the first November next, and if not, to pay five hundred dollars, for value received." It was admitted at the trial that this instrument was given in part payment of a tract of land which the defendant had purchased of the plaintiff; and it was proved on the part of the plaintiff, that between the date of the agreement and the first of November, 1843, the highest prices of cotton were, in Columbia, 8 1-2 and 8 3-4 cents, and in Charleston, 9 and 9 1-4 cents.

The defendant contended, 1st, that the agreement was a wager on the price of cotton; 2d, that according to the true construction of the instrument, the defendant was only bound to pay the larger sum, if cotton was selling for eight cents on or near the first of November, and that this had not been shown.

Under the instructions of his Honor the presiding judge, the jury found for the plaintiff the larger sum.

The defendant appealed, and now moved this court for a new trial.

Boyce and Gregg, for the motion.

CURIA, *per* FROST, J. The objection chiefly urged against the instructions of the circuit judge, affects the construction of the agreement to pay the larger sum expressed in the note, "if cotton should rise to eight cents by the first of November next." It appeared by admissions at the trial that the defendant was treating with the plaintiff for the purchase of a tract of land; and declining to give the price which the plaintiff asked, it was agreed that the defendant should pay a certain sum if cotton advanced, or less if it did not. (The defendant insists that the import of the agreement is, that cotton should rise to eight cents "at or near" the first of November.) (The various significations to which the necessities of language have applied this and other propositions, would render any construction of the agreement, based on a critical analysis of its meaning, very unsatisfactory. (But it may be observed that *by*, in its primitive sense, expresses relation to place; though by various remote and obscure analogies and casual associations, that meaning is variously modified. In relation to place, it clearly does signify "at or near," but its import is more indefinite when used to express the relation of time. In this application it signifies "on or before.") Many examples of this sense readily occur. If a contract were made for the delivery of an article, or the completion of work, by a particular time, to be paid for on completion, or delivery, a claim for the price would accrue on performance, whenever that might be; for the agreement provides for a performance and payment before the appointed time, but leaves the time of performance wholly indefinite. It would be more difficult to derive an example of the defendant's construction from the transactions of life. The popular signification of words, that which use has made familiar in the affairs of men, must be adopted in giving construction and effect to their contracts.

The objection to the agreement that it is a wager is plainly inapplicable; for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product.

The motion is dismissed.¹

SECTION III.

Contracts Obstructing the Administration of Justice.

(a) CHAMPERTY AND MAINTENANCE.

HUTLEY v. HUTLEY.

IN THE QUEEN'S BENCH, JANUARY 24, 1873.

[Reported in *Law Reports*, 8 *Queen's Bench*, 112.]

DECLARATION that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir-at-law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purpose and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of

¹ *Plumb v. Campbell*, 129 Ill. 101; *Wolf v. National Bank*, 178 Ill. 85; *Phillips v. Gifford*, 104 Iowa, 458; *Kirkpatrick v. Bonsall*, 72 Pa. 155, *acc.* See also *United States v. Olney*, 1 Abb. U. S. 275; *Lynch v. Rosenthal*, 144 Ind. 86; *Dion v. St. John Baptiste Soc.*, 82 Me. 319; *Miller v. Eagle, &c. Ins. Co.*, 2 E. D. Smith, 268; *Dunham v. St. Croix Mfg. Co.*, 34 N. Bruns. 243.

The winner of a race is generally allowed to recover the prize offered. *Alvord v. Smith*, 63 Ind. 58; *Moulton v. Daviess County Assoc.*, 12 Ind. App. 542; *Delier v. Plymouth County Soc.*, 57 Iowa, 481; *Misner v. Knapp*, 13 Oreg. 135; *Porter v. Day*, 71 Wis. 296; *Gates v. Tinning*, 5 U. C. Q. B. 540. See also *Harris v. White*, 81 N. Y. 532; *People v. Fallon*, 152 N. Y. 12; *Ballard v. Brown*, 67 Vt. 586.

the deceased. Allegation of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

Philbrick (*Pearce* with him), in support of the demurrer.

Day, Q. C. (*Anderson* with him), for the plaintiff.

BLACKBURN, J. The question is whether the contract disclosed on this declaration is such as can be enforced in a court of law. Putting out of the question, for the moment, the position of the plaintiff, it alleges that the defendant is heir-at-law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal. *Sprye v. Porter*, 7 E. & B. 58, 81; 26 L. J. (Q. B.) 64, 71, was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the court, says: "Here we have maintenance in its worst aspect. The plaintiff and Rosaz, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one fifth of the property when so recovered; and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, *evidence*; and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal; and *Stanley v. Jones*, 7 Bing. 369, is an express authority to that effect." Putting aside that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far as that the present plaintiff only agrees to obtain evidence, whereas in *Sprye v. Porter*, 7 E. & B. 58; 26 L. J. (Q. B.) 64,

the plaintiff undertakes to supply evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said showed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff, not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in *Findon v. Parker*, 11 M. & W. 675, 679, that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit, I cannot see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject-matter of the suit were true, that would not justify or make legal the agreement to share in the property to be recovered by the defendant. There must, therefore, be judgment for the defendant.

LUSH, J. I am of the same opinion. It is conceded by the plaintiff's counsel that if it were not for the plaintiff's interest the contract in the declaration would amount to champerty. First, the plaintiff is a cousin of the deceased; that would give him no interest. Nor would the relationship to the defendant justify an agreement of champerty. Then there is the allegation that the plaintiff believed that the will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and assuming that this shows that the plaintiff had, or thought he had, a collateral interest in contesting the will, that collateral interest would not justify an agreement to share the property which the defendant should acquire by successfully contesting the will. There are cases which show that there are circumstances which may justify a person in maintaining, that is, in assisting, one of the litigant parties in a suit; certain relationship would justify maintenance; but I know of no

case, and Mr. Day has not produced the semblance of an authority for saying that relationship or collateral interest justifies champerty. Therefore the additional allegations in the declaration do not make the agreement good.

ARCHIBALD, J. I am also of opinion that the declaration is bad. It does not show any circumstances, either on the ground of relationship or interest, to make the agreement good. There are cases to show that a common interest, or even a *bonâ fide* belief in the existence of a common interest,¹ would justify the mere maintenance of the suit; but they go no further. The present case falls within the principle of *Sprye v. Porter*, 7 E. & B. 58; 26 L. J. (Q. B.) 64.

Judgment for the defendant.

MONTRAVILLE ACKERT v. ALFRED B. BARKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 27 —
OCTOBER 10, 1881.

[Reported in 131 *Massachusetts*, 436.]

CONTRACT for money had and received. The answer set up that the defendant was an attorney at law, and as such was employed by the plaintiff to collect certain sums of money from certain insurance companies; "that the plaintiff agreed, in consideration of the defendant acting for him in the premises, that said defendant should, out of any and all moneys received by him from said insurance companies, retain one half of the amount received after payment of proper costs and charges;" admitted the receipt of a certain sum from the insurance companies; and averred that the defendant had the right to retain out of it the costs and expenses and one half of the sum remaining after deducting such costs and expenses. Trial in the Supreme Court, before Allen, J., who allowed a bill of exceptions, which, after stating that the pleadings were a part thereof, was in substance as follows: —

The defendant admitted the receipt of \$836 from two insurance companies, but contended in his answer that the plaintiff could rightfully demand of him only half the whole sum collected, less costs of the suits

¹ Or motives of charity: *Harris v. Brisco*, 17 Q. B. D. 504. See further, *Alabaster v. Harness*, [1895] 1 Q. B. 339; *Breay v. Royal Assoc.*, [1897] 2 Ch. 272.

² *Munday v. Whissenhurst*, 90 N. C. 458, acc. The English laws of maintenance and champerty are not in force in India, and a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, is not necessarily to be regarded as opposed to public policy. But such agreements should be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid. *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Cas. 186.

brought to enforce the demands on which the said collections were made, because the plaintiff promised to allow him one half the amount recovered, in consideration for professional services rendered in this behalf; that he had a right, under such agreement, to stop out or retain such sum; and his testimony was to that effect. He also testified that said agreement did not require him to bear or be responsible for the expenses of said suits.

The defendant asked the judge to rule as follows: "1. If it appears that the percentage mentioned in the alleged agreement amounted only to a measure of compensation in the event of a successful termination of the suits, in distinction from an indefinite fee to be charged in the event of the unsuccessful termination of the suits, then the contract is not champertous, and it can be enforced. 2. If, under the terms of the agreement, the defendant had a right to stop out of, or retain from, the funds collected one half the total sum for professional services, and actually had stopped out such sum prior to any notice to him that the contract was abrogated by the plaintiff, then the transaction was so far closed in that behalf that the plaintiff cannot herein undo or avoid the same."

The judge refused to give either of the rulings asked for, but instructed the jury that, if they found there was an agreement by which the defendant was entitled to retain one half the sum collected as compensation for services, such agreement was unlawful, and would not avail the defendant in this action.

The jury returned a verdict for the plaintiff in the sum of \$808.04; and the defendant alleged exceptions.

H. C. Bliss, for the defendant.

H. C. Strong (*E. H. Lathrop* with him), for the plaintiff.

GRAY, C. J. The defendant's answer and bill of exceptions, fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one half of the amount recovered in case of success, and should receive nothing for his services in case of failure.

By the law of England, from ancient times to the present day, such an agreement is unlawful and void for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564; Hobart, C. J., *Box v. Barnaby*, Hob. 117 a; Lord Nottingham, *Skapholme v. Hart*, Finch, 477; s. c. 1 Eq. Cas. Ab. 86, pl. 1; Sir William Grant, *M. R., Stevens v. Bagwell*, 15 Ves. 139; Tindal, C. J., *Stanley v. Jones*, 7 Bing. 369, 377; s. c. 5 Moore & Payne, 193, 206; Coleridge, J., *Forre Masters*, 1 Har. & Wol. 348; Shadwell, V. C., *Strange v. Brennan*, 15 Sim. 346; Lord Cottenham, s. c. on appeal, 2 Coop. temp. Cotten-

ham, 1; Erle, C. J., *Grell v. Levy*, 16 C. B. (n. s.) 78; Sir George Jessel, M. R., *In re Attorneys & Solicitors Act*, 1 Ch. D. 573.

It is equally illegal by the settled law of this commonwealth. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Swett v. Poor*, 11 Mass. 549; *Allen v. Hawks*, 18 Pick. 79, 83; *Call v. Calef*, 18 Met. 362; *Rindge v. Coleraine*, 11 Gray, 157, 162; 1 Dane Ab. 296; 6 Dane Ab. 740, 741. In *Lathrop v. Amherst Bank*, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Met. 492. In *Scott v. Harmon*, 109 Mass. 237, and in *Tapley v. Coffin*, 12 Gray, 420, cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success.

The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the legislature, and not from the courts.

The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims entrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant, that he should keep one half of that amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deducting what the jury have allowed him for his costs. *In re Masters*, and *Grell v. Levy*, above cited; *Pince v. Beattie*, 32 L. J. (n. s.) Ch. 734.

Of *Best v. Strong*, 2 Wend. 319, on which the defendant relies as showing that, assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant, with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided.

Exceptions overruled.

MARK A. BLAISDELL v. HONORA AHERN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS,

JAN. 20 — MAY 7, 1887.

[Reported in 144 Massachusetts, 393.]

W. ALLEN, J. This is an action by an attorney at law to recover for professional services. The only question argued is, whether the

Ackert v. Barker, 131 Mass. 436, and *Belding v. Smythe*, 138 Mass. 530, are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. *Tapley v. Coffin*, 12 Gray, 420; *Scott v. Harmon*, 109 Mass. 237; *McPherson v. Cox*, 96 U. S. 404; *Christie v. Sawyer*, 44 N. H. 298; *Anderson v. Radcliffe, E., B. & E.* 806, 817.

We do not see anything in the agreement which renders it void for maintenance. In a sense, a lawyer may be said to maintain another in a suit when he gives his advice or services, as formerly it would have been maintenance for a layman to do so; but such acts have long since ceased to be unlawful, and it would now nowhere be held to be in itself unlawful for a lawyer to give his services to prosecute a suit, with the understanding that his services are to be free unless success shall give to his client the ability to pay him, and that in that case he will expect liberal fees. There may be circumstances in which such a contract would be meritorious; and there may be circumstances in which it would partake of the worst evils of maintenance. Under what circumstances a contract of that nature might be held void as against public policy, we need not consider. The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and an agreement by the defendants to pay large and liberal fees if successful; and we know no authority and no reason in public policy why, under the relations and circumstances of the parties, it was not a lawful contract, which they had a right to enter into. We think that the ruling, as matter of law, that the action could not be maintained, was wrong. *New trial granted*¹

J. L. Thorndike (*N. Morse* with him), for the plaintiff.

J. Bennett (*E. O. Cooke* with him), for the defendants.

CHARLES THOMPSON v. JOSEPH S. REYNOLDS.

ILLINOIS SUPREME COURT, SEPTEMBER TERM, 1874.

[Reported in 73 *Illinois*, 11.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, judge, presiding.

Messrs. Merriam and Alexander, for the appellants.

Mr. John C. Richberg, for the appellee.

¹ See further, *Joy v. Metcalf*, 161 Mass. 514; *Davis v. Commonwealth*, 164 Mass. 241; *Hadlock v. Brooks*, 178 Mass. 425; *Butler v. Legro*, 62 N. H. 350.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:—

Some time in the latter part of the year 1868, appellee and his partner were consulted by appellants as to whether they should execute a release, without consideration, of certain property mentioned in the deed. The partner advised that they had no interest, and could do so without prejudice to their rights; but, subsequently, another quitclaim deed was, in like manner, presented for a large amount of property. Appellee was then applied to for further advice, when he, with appellant Charles Thompson, consulted with one James Dunne, also an attorney, who occupied the same office with appellee. They investigated the matter and arrived at the conclusion that appellants had an interest in the property.

An agreement was soon after entered into between appellants and appellee, by which appellee was to institute all necessary proceedings to ascertain and fix the rights of appellants; that he should pay all necessary expenses, and receive one half of whatever should be realized. Appellants agreed that they would do no act to interfere with the proceedings. It is claimed that, with the consent of the parties, appellee agreed with Dunne he should assist in prosecuting the claims, for which he was to receive one half of appellee's moiety, being one fourth of what should be recovered.

Soon after, proceedings were commenced in the Circuit, the Superior, and the County courts by these attorneys. During the continuance of these proceedings, it is claimed that about \$10,000 was realized by appellants executing releases, by way of compromise, with several defendants to the various suits, and it is claimed that these proceeds were divided according to the terms of the agreement.

About the month of May, 1871, appellants, it is claimed, without the consent of appellee or of Dunne, terminated the several proceedings and conveyed the lands in litigation, in consideration of \$7,500 actually paid to them; and to recover one half of that sum this action was brought. A trial by the court and a jury was had, resulting in a verdict of \$1,500 in favor of plaintiff, on which a judgment was rendered and this appeal prosecuted.

A number of errors are assigned on the record, but in the view we take of the case, we shall only consider whether the judgment is against the law. The court was asked to instruct the jury that the agreement entered into was champertous and void, but the court below refused to give the instruction. Blackstone defines champerty (vol. iv. p. 135) as "a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." The same author informs us that the punishment, if a common person, for champerty, was by fine and imprisonment; and this was a misdemeanor, punishable at the common law.

See Hawk. Pleas of the Crown, vol. 1. p. 463. It was also prohibited by various ancient statutes, commencing as early as the Statute of Westminster 1, ch. 25, all of which enact heavy penalties for their violation.

It thus appears that champerty was an offence at the common law, and our General Assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed, this must be regarded as in force in this State, as affecting all such contracts, and as being opposed to sound public policy. It is certainly applicable to our condition so far as it relates to attorney and client, and contracts with intermeddlers and speculators in apparently defective titles to property. If allowed to be practised by attorneys, it would give them an immense advantage over a client. The superior knowledge of the attorney of the rights of the client would give him the means of oppression, and acquiring great and dishonest advantages over the ignorant and unsuspecting owner of property. By giving false advice, the attorney, owing to the confidence his client reposes in him, and to his superior knowledge, would have the client completely at his mercy, and would thus be enabled to acquire the client's property in the most dishonorable manner. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession, that would, from the very nature of things, lead to great abuses and oppression.

Whilst the great body of the profession are honest, and understand and act on the duties devolving upon them, there necessarily must be, in this as in all ages of the past, some who gain admission that have neither the integrity nor sense of duty necessary to restrain them from dishonorable means in practice. Usually a person will not employ an attorney unless he feels assured of his honesty as a man as well as his ability as an attorney. Having this confidence, all must see at a glance that it would give the attorney immense power over the client, and with this power all must see that to permit him to make champertous contracts would be to place the client in the power of the attorney. Professional duty requires that advice given should be honest, fair, and unreserved; but where the weak in morals or the vicious are consulted, and they see and determine to embrace the opportunity to make a champertous contract, how can we expect them to give fair, honest, and unreserved advice at the commencement, or in conducting the litigation? The just, the good and upright require no restraints, but the vicious or immoral should be freed from temptation.

At all times in the past champerty has been found a source of oppression and wrong to the property owner, and a great annoyance to the community. To allow it to attorneys, with a portion, but it is believed the number would be small, there would be strong temptation to annoy others by the commencement of suits without just claim or right, merely to extort money from the defendant in buying his peace. Such practices have been denominated as a crime *malum in se*.

And such extortion from others, or by the oppression of a client, is unquestionably a great moral delinquency, that no government regardful of the rights of its citizens should ever tolerate. We see that it is as liable now to abuse as it ever was, and would be as injurious to our community as to other communities in the past. And this court has repeatedly held that common law misdemeanors may be punished in this State, unless abrogated by statutory enactment.

Then, has this common law offence been repealed? We think not. The General Assembly has defined the offences of barratry and maintenance, but the offence of champerty is not named; and as, at common law, all three of these offences were regarded as separate and distinct, and as the British Parliament enacted separate laws in reference to each, and as they were enforced by distinct proceedings, we may regard them as different offences, although champerty is said to be a species of maintenance. Then, if the 108th section of the Criminal Code would not embrace this offence, it is in force as a common law misdemeanor, and we do not see that it does.

But it is said that the case of *Newkirk v. Cone*, 18 Ill. 449, has determined that there is no law in this State against champerty; but this is manifestly a mistake. In that case there seems, at first, to have been a champertous agreement, but it was abandoned by the parties by mutual consent. *Cone* then went on and rendered services, and sued for professional services in prosecuting and defending causes, also for examining records in public offices, abstracting title to lands, drawing, copying, and engrossing conveyances, deeds, and writings, for journeys and purchasing lands, and for work and labor. Thus, it will be seen that, although it may have been argued, the question of maintenance or champerty was not before the court, but simply whether an attorney may recover a fair compensation for professional services and labor performed as an agent; and it was held that a contract of hiring, for the purpose of investigating title, and making purchases, and rendering legal services in settling titles to land thus purchased, was legal, and the person employed could recover for such services. It is true that the court refer to the ancient common law and British statutes to show that the contract of the parties then before the court was not affected by them. It was also shown that our statute against maintenance did not embrace that contract. There, a person desiring to purchase lands employed an attorney to examine title, to give him an opinion as to its validity, and when purchased to litigate against conflicting titles, which was held not to be maintenance. That case is essentially different from this, both in its facts and on principle, and for these reasons it cannot be regarded as an authority in favor of appellee in this case.

This court has held in *Gilbert v. Holmes*, 64 Ill. 548, and *Walsh v. Shumway*, 65 Ill. 471, that similar contracts were tainted with champerty, and could not be enforced.

According to the doctrine of the case of *Scoley v. Ross*, 13 Ind. 117,

there can be no question that this contract is champertous, according to the doctrine of the courts of this country. That case refers to and reviews a large number of American decisions on this question, and carries the doctrine to the full extent of the English rule.

It was the policy of the common law to protect persons from harassing and vexatious litigation. Hence, it would not permit a person having no interest in the subject-matter of the litigation to intermeddle or to become interested in the suit of another, unless it was an attorney, who could only have and demand a fee for his services, and that not in a portion of the thing in dispute. In the absence of such a rule, great wrong would necessarily be inflicted on the community.

On a consideration of all the authorities, we are clearly of opinion that this contract, however honestly entered into and carried out, was void, and that the judgment of the court below should be reversed and the cause remanded.

*Judgment reversed.*¹

¹ "It is next urged that the contract is champertous and void, as against public policy. It is true that the land in question was in the possession of Kerr at the time the contract involved was entered into, and the contract provided that the litigation should be carried on, and Beckwith, Ayer, and Kales were to render the professional services, and were to receive one fourth of what should be realized for such services. If an agreement of this character, entered into between attorney and client, is champertous, then the point is well taken; but as we understand the law, the contract lacked one essential element to render it champertous, and that is, that the attorneys should prosecute the litigation at their own costs and expenses. Had the contract provided that the attorneys should carry on the litigation for a share of what they might recover, at their own cost and expense, then the contract might have been champertous and void. *Thompson v. Reynolds*, 73 Ill. 11; *Park Commissioners v. Coleman*, 108 id. 601. Such, however, is not the case. The written contract, which alone fixes and determines the rights and duties of the parties, contains no provision whatever requiring the attorneys or the park commissioners to pay the costs or expenses of the litigation. The fact that the park commissioners may have advanced Phillips money which was used in the prosecution of the litigation, has no bearing on the question." *Phillips v. South Park Commissioners*, 119 Ill. 626, 635.

This test is that usually adopted. *Peck v. Heinrich*, 167 U. S. 624; *McPherson v. Cox*, 96 U. S. 404; *Jeffries v. Mutual Ins. Co.*, 110 U. S. 305; *Muller v. Kelly*, 116 Fed. Rep. 545; *Keiper v. Miller*, 68 Fed. Rep. 627; *Swanston v. Morning Star Mining Co.*, 13 Fed. Rep. 215; *Wheeler v. Pounds*, 24 Ala. 472; *Stanton v. Haskin*, 1 McArthur (D. C.), 558; *Johnson v. Van Wyck*, 4 D. C. App. 294; *Moses v. Bagley*, 55 Ga. 283; *Meeks v. Dewberry*, 57 Ga. 263; *Taylor v. Hinton*, 66 Ga. 743; *Johnson v. Hilton*, 96 Ga. 577; *Coleman v. Billings*, 89 Ill. 183; *Geer v. Frank*, 179 Ill. 570; *Coquillard v. Bearse*, 21 Ind. 479; *Hart v. State*, 120 Ind. 83; *Jewel v. Neidy*, 61 Iowa, 299; *Wallace v. Chicago, &c. Ry. Co.*, 112 Iowa, 565; *Atchison, &c. Railroad Co. v. Johnson*, 29 Kan. 218, 227; *Aultman v. Waddle*, 40 Kan. 195; *Million v. Ohnsorg*, 10 Mo. App. 432; *Duke v. Harper*, 66 Mo. 51; *Coughlin v. Railroad Co.*, 71 N. Y. 443; *Hayney v. Coyne*, 10 Heisk. 339; *Weakly v. Hall*, 13 Ohio, 167; *Brown v. Ginn*, 66 Ohio St. 316; *Chester Co. v. Barber*, 97 Pa. 455; *Perry v. Dicken*, 105 Pa. 83; *Martin v. Clarke*, 8 R. I. 389; *Nelson v. Evans*, 21 Utah, 202; *Hamilton v. Gray*, 67 Vt. 233; *Nickels v. Kane's Adm.*, 82 Va. 309; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Wis. 502; *Dockery v. McLellan*, 93 Wis. 381, *acc.* See also *Casserleigh v. Wood*, 119 Fed. Rep. (C. C. A.) 308.

If the agreement provides that the owner of the right of action shall not compromise or settle the claim, the provision has been held to make the contract illegal.

N. HILL FOWLER, APPELLANT, v. CHARLES T. CALLAN
ET AL., RESPONDENTS.

NEW YORK COURT OF APPEALS, APRIL 19 — JUNE 1, 1886.

[Reported in 102 New York, 395.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made at the January term, 1884, which affirmed judgments in favor of defendants, entered upon an order dismissing the complaint on trial. (Reported below, 12 Daly, 263.)

This was an action of ejectment to recover an undivided half of certain premises to which plaintiff claimed title under a deed from defendant Callan. The plaintiff is an attorney at law, and the deed was delivered to him in pursuance of a contract, the substance of which is stated in the opinion.

Scott Lord, for appellant.

J. Adolphus Kamping, for respondent Callan.

Quentin McAdam, for respondents Kelly and Griffin.

FINCH, J. It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. *Sedgwick v. Stanton*, 14 N. Y. 289. The attorney may agree upon his compensation, and it may be contingent upon his success, and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and while their propriety has been vehemently debated, they are not illegal, and when fairly made are steadily enforced. In substance that was the contract here made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant as devisee under a will was entitled to certain real estate, — his right dependent upon the validity of the will, and in some manner threatened by proceedings before the surrogate which put his interest in peril, and made a defence essential to its protection. In this emergency he sought the aid and professional service of the plaintiff and retained him as attorney. The latter neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned

Foster v. Jacks, 4 Wall. 334; *North Chicago R. R. Co. v. Ackley*, 171 Ill. 100; *Elwood v. Wilson*, 21 Iowa, 523; *Boardman v. Thompson*, 25 Iowa, 487; *Huber v. Johnson*, 68 Minn. 74. But see *Hoffman v. Vallejo*, 45 Cal. 564; *P. C. C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 363; *Ryan v. Martin*, 16 Wis. 57; *Kusterer v. Beaver Dam*, 56 Wis. 471.

by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised or was out of possession, but he gave to the attorney a deed of the one undivided half part of the property, taking back his covenant to conduct the defence to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability. The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The contract in no respect induced the litigation. That was already begun and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff, therefore, stirred up no strife, induced no litigation, but merely agreed to take for his compensation so much of the value of the land conveyed to him as might remain out of that value after the costs and expenses had been paid. We do not think the statute condemns such an agreement. 3 R. S. [6th ed.] 449, §§ 59, 60; Code, §§ 73, 74. The Code revision changed somewhat the language of the prohibition, but, nevertheless, must be deemed a substantial re-enactment of the earlier sections. *Browning v. Marvin*, 100 N. Y. 144, 148. They forbid, first, the purchase of obligations named by an attorney for the purpose and with the intent of bringing a suit thereon; and, second, any loan or advance, or agreement to loan or advance, "as an inducement to the placing, or in consideration of having placed in the hands of such attorney," any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and in which the latter by officious interference procures the suit to be brought and obtains a retainer in it. The statute speaks of a "demand" which by enforcement will end in a "collection;" phrases which have no aptness to the situation of one simply defending a good title to land against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no "loan or advance" in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which

the latter was bound to reimburse. Simply he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses. The facts before us are not within the terms of the statutes as it respects a "demand" which is the subject of "collection;" but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ *Hoffman v. Vallejo*, 45 Cal. 564; *Richardson v. Rowland*, 40 Conn. 565; *Metropolitan Ins. Co. v. Fuller*, 61 Conn. 252; *Browne v. West*, 9 N. Y. App. Div. 135; *Brown v. Bigne*, 21 Oreg. 260; *Bentinck v. Franklin*, 38 Tex. 458; *Stewart v. H. & T. C. Ry. Co.*, 62 Tex. 246, *acc.* See also *Bayard v. McLane*, 3 Har. (Del.) 139. Compare *Huber v. Johnson*, 68 Minn. 74; *Van Vleck v. Van Vleck*, 21 N. Y. App. Div. 272; *Badger v. Celler*, 41 N. Y. App. Div. 599.

In *Taylor v. Bemiss*, 110 U. S. 42, 45, the Court said:—

¹ "It remains to be considered whether there is in this contract of employment anything which, after it has been fully executed on both sides, should require it to be declared void in a court of equity, and the money received under it returned. It was decided in the case *Stanton v. Embrey*, 93 U. S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in successful cases, where none is to be received in case of failure.

"Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights.

"This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved.

"While fifty per cent seems to be more than a fair proportion in the division between client and attorney in an ordinary case, we are not prepared to assume that it is extortionate for that reason alone, and the testimony of the lawyers on that subject, taken as experts, does not justify such a conclusion. In the case before us, it is beyond dispute that the attorneys of Mrs. Bemiss exercised no influence over her whatever in adjusting the amount of the fee stipulated in the agreement. They had never known her until this employment, and it was through no suggestion of theirs or any agent of theirs that she applied to them. Her first letter to them on the subject made the offer of fifty per cent, and no more was asked for by them.

"The evidence of two of the judges who composed the court shows that the case was a difficult and complicated one, and that both Taylor and Wood attended to it vigorously, and gave it much time and attention, and that it was in court a considerable time." *Taylor v. Bemiss*, 110 U. S. 42, 48.

LEONARD W. GAMMONS v. GUSTAF JOHNSON

MINNESOTA SUPREME COURT, APRIL 26, 1899.

[Reported in 76 Minnesota, 76.]

MITCHELL, J.¹ . . . The complaint in this case is silent as to any special contract between the defendant and either the plaintiff or Huber. For his first and second causes of action, the plaintiff alleges generally the performance of professional services, and the expenditure of money by the plaintiff for the defendant at his instance and request. For his third and fourth causes of action, he alleges generally the performance of certain labor and services, and the expenditure of certain moneys by Huber for the defendant at his special instance and request, which claims had been assigned by Huber to the plaintiff.

In his answer, the defendant, among other things, denied that he ever employed or requested the plaintiff to perform any services for him, or that plaintiff ever did perform any. The answer further alleged, and upon the trial the defendant offered to prove, that, in the spring of 1896, plaintiff and Huber (who was a layman) entered into an agreement or arrangement whereby Huber and one Mossberg, as the agent of plaintiff and Huber, were to go through certain counties in the northern and western parts of the State to seek out claims, and instigate suits against the Great Northern Railway Company for damages resulting to different parties from the failure of the railroad company to fence its track across the land of such parties, and, when they discovered any such claim, to procure the party having the claim to bring suit against the railroad company; that, for the purpose of working up and procuring the institution of such suits, plaintiff furnished Huber with blank contracts for the parties to execute, which were identical in terms with the contract already referred to between defendant and Huber, of which it was one; that, in pursuance of this agreement, Hubert and Mossberg canvassed some nine counties to seek out and bring to light such claims, and induced seventy-one separate and distinct persons (among others this defendant) to execute such contracts, under which seventy-one suits were instituted against the railroad company by Huber and plaintiff, but in the names of the parties who had executed the contracts, in all of which the plaintiff appeared as attorney; that in these suits the amount of damages claimed ranged from \$400 to \$1,500 in each suit, but all of them, except one or two, were settled before trial by the railroad company with the landowners for from one dollar to five dollars each; that none of these parties would have brought these suits but for the systematic work of the plaintiff and Huber to induce them to do so; and that defendant was one of the parties who was thus induced by Huber to sign a contract authorizing the commencement of a suit against the railroad company. The defendant also

¹ A portion of the opinion and the concurring opinion of CANTY, J., are omitted.
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offered evidence that at least some of these parties did not know that they had any claim against the railroad company, until so informed by Huber.

All of this evidence was excluded on the objection of the plaintiff; and this ruling is the subject of one of the main assignments of error.

It conclusively appears from the evidence that the suit against the railroad company was instituted in the name of the defendant by Huber or plaintiff, or both, under and in pursuance of the written contract, already referred to, between defendant and Huber; that whatever services or expenditures were performed or made by either of them were in the institution and prosecution of that suit in accordance with the terms of that contract; also that plaintiff was never employed by defendant personally, but, if employed by any one, it was by Huber; and that when plaintiff instituted the suit against the railroad company he knew all about the contract between defendant and Huber, and accepted employment, and did whatever he did, upon the strength of it. It also appears that defendant settled with the railroad company for \$100 before the suit was tried.

According to the evidence offered and excluded, plaintiff and Huber, who were strangers to the parties and to the claims which were the subjects of these contracts, and who had no object in intermeddling with the matters, except a speculative one, entered into a systematic scheme to hunt up claims, or supposed claims, against the Great Northern Railway Company, upon which the original holders would probably never have asserted any right or brought any action, and to stir up wholesale litigation, and induce the landowners to allow them to bring actions, by agreeing to prosecute the suits at their own expense, indemnify these clients against the costs and expenses of litigation, accept for their compensation a share of what might be recovered, and not to charge anything for their service unless they succeeded in collecting the claims, and further attempted to make the contract ironclad by incorporating into it a provision that the clients should not settle with the railroad company without their consent, under the penalty of having to pay them a specified sum, apparently fixed arbitrarily without reference to the value of their services. A course of conduct on the part of either an attorney or layman more obnoxious than this to public policy, as involving champerty, maintenance, and barratry, cannot be well imagined.

The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules rested, and the evils and abuses at which they were aimed, still exist. The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to

be held void on grounds of public policy. It is doubtless the more modern doctrine that the mere taking a case on a contingent fee does not constitute champerty, and that it is not unlawful for an attorney to carry on a suit for another for a share of what may be recovered, at least unless he assumes the risks of litigation by indemnifying his client against all costs and expenses of the same. But the vice in the conduct of these parties lies deeper and much further back than merely entering into a champertous contract for their compensation for lawful services performed in the prosecution of suits legitimately instituted.

According to the facts alleged and offered to be proved, it consisted of an unlawful and barratrous systematic scheme to work up and instigate wholesale vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers, and in which they had no interest, except a speculative one in the pecuniary profit which they might derive from the litigation which they had instigated, and which in all probability never would have been instituted except for their officious intermeddling. The illegality of the conduct of the parties enters into the very inception of the scheme by which the litigation itself was instigated, and but for which it would never have existed. Even if the special written contracts regarding compensation be set aside or ignored, this original vice, in the very inception of the scheme, would still exist in full force.

To hold that a party can thus illegally stir up and instigate litigation, and yet obtain the benefits of it by ignoring the special contracts, and bringing suit upon a *quantum meruit* for services performed in prosecuting the litigation which he has unlawfully instigated, would be a travesty on justice, and to permit a party to do indirectly what he cannot do directly.¹ It is unnecessary to consider whether the course of conduct alleged and offered to be proved would be a ground for the disbarment of an attorney. It is, however, so clearly against public policy that the courts ought not to enforce such a contract, or aid a party in recovering the fruits of such a speculative and vicious scheme. If defendant can prove what he alleges in his answer, and what he offered to prove, it would constitute a complete defence to each and all of the causes of action set up in the complaint. It was therefore error for the Court to exclude the evidence.²

¹ Compensation on the basis of *quantum meruit* has sometimes been allowed an attorney who has rendered services under a champertous agreement. *Holloway v. Lowe*, 1 Ala. 246; *Elliott v. McClelland*, 17 Ala. 206; *Goodman v. Walker*, 30 Ala. 482, 500; *Bust v. Larue*, 4 Litt. 411; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Gammons v. Johnson*, 69 Minn. 488; *Stearns v. Felker*, 28 Wis. 594. See also *Merritt v. Lambert*, 10 Paige, 352, *aff'd* 2 Denio, 607. But see, involving a contrary principle, *Ackert v. Barker*, 131 Mass. 436; *Butler v. Legro*, 62 N. H. 350; *Munday v. Whisenhurst*, 90 N. C. 458. See also *Pince v. Beattie*, 32 L. J. Ch. 734; *Grell v. Levy*, 16 C. B. n. s. 73; *Willemin v. Bateson*, 63 Mich. 309.

² *Gammons v. Gulbranson*, 78 Minn. 21, *occ.* See also *Alpers v. Hunt*, 86 Cal. 78; *Hirschbach v. Ketchum*, 5 N. Y. App. Div. 324. Compare *Metropolitan Ins. Co. v.*

SMALL v. THE C., R. I., & P. R. CO.

IOWA SUPREME COURT, APRIL 6, 1881.

[Reported in 55 Iowa, 583.]

¹THIS is an action to recover the value of a grain elevator, and certain grain and other property which it is alleged were destroyed by fire, set by defendant in operating its railroad. Two causes of action are set out in the petition, — one of said causes being for the destruction of the elevator and one Fairbanks' scale, which it is alleged were the property of the Farmer's Union Elevator Company, and that said company after the said property was destroyed by fire assigned its claim for damages to the plaintiff. The other cause of action is for the loss by fire of other property which it is alleged was owned by the plaintiff.

There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

H. S. Winslow, Smith & Wilson, and Matt. Phelps, for appellant.

S. H. Fairall, Bonorden & Ranck, and John N. Rogers, for appellee.

ROTHROCK, J. In the seventh division of the answer the defendant pleaded as a defence that before the commencement of the suit it was agreed, between the plaintiff and his attorneys, that said attorneys should carry on the suit at their own costs and expense, and that they should receive for their services and said costs and expenses about one sixth of the amount of the recovery, if the litigation should prove successful, and if they should fail in the action they should receive nothing. It was averred that said agreement and contract was against public policy, champertous, and void. There was a demurrer to this division of the answer, which was sustained. To this ruling exceptions were taken, and error is assigned thereon.

That the averments of the answer would be a good defence to an action by the attorneys to recover of the plaintiff upon the alleged contract may, for the purposes of this case, be admitted. But that it can be interposed by the defendant to defeat a recovery by the plaintiff, in his own name, for the damages sustained by him, is quite another question. That there are authorities, the most respectable, which hold that when it appears that a plaintiff is prosecuting an action under a champertous arrangement between himself and his attorney, the action should be abated, must be conceded. But on the other hand there are cases which hold the contrary doctrine. In *Fuller*, 61 Conn. 252; *Vocke v. Peters*, 58 Ill. App. 338; *Wheeler v. Harrison*, 94 Md. 147. A contract to secure evidence necessary for winning a suit for a fee contingent upon success is generally held illegal. *Stanley v. Jones*, 7 Bing. 369; *Gillett v. Board*, 67 Ill. 286; *Quirk v. Muller*, 14 Mont. 467; *Getchell v. Welday*, 2 Ohio N. P. 390. But see *Casserleigh v. Wood*, 14 Col. App. 265.

¹ Only so much of the case is printed as relates to the defence of champerty.

Hilton v. Woods, L. R. 4 Eq. Cas. 432, *Malvin, V. C.*, said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that when the right of the plaintiff, in respect of which he sues, is derived under a title founded in champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that, when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise."

See also *Elborough v. Ayres*, L. R. 10 Eq. Cas., 367; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robinson v. Beale*, 26 Ga. 17.

It seems to us that there is no sound reason nor just principle in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract with his attorney which is utterly void, and which, therefore, cannot be enforced by either of the contracting parties. As to the defendant in this action, who seeks to avail itself of the illegal contract, the rights of the parties are the same as if it had never been made. The plaintiff is still the real party in interest. The illegal and champertous contract, being void, divests him of no right. That by reason thereof he should be disabled from asserting his rights, we do not believe. It is enough that the parties to such contracts be authorized to repudiate them, without allowing others to exonerate themselves from just obligations by reason thereof. As is said by Day, J., in *Allison v. C. & N. W. R. Co.*, 42 Iowa, 274, "If he (the defendant in the action) could do so, an unheard-of effect would be given to a void agreement. Suppose a suit upon a promissory note is prosecuted under a champertous arrangement between the plaintiff and his attorney; does this avail the defendant to defeat an otherwise just liability? Will not the law rather compel the defendant to perform his undertakings and leave the question of champerty to be determined between the plaintiff and his attorney?"¹

¹ *Hilton v. Woods*, 4 Eq. 432; *Burnes v. Scott*, 117 U. S. 582; *Courtright v. Burnes*, 3 McCrary, 60; *Sibley v. Alba*, 95 Ala. 191; *Missouri Pac. Ry. Co. v. Smith*, 60 Ark. 221; *Gage v. Downey*, 79 Cal. 140; *Robinson v. Beall*, 26 Ga. 17; *Ellis v. Smith*, 112 Ga. 480; *Torrence v. Shedd*, 112 Ill. 466; *Stearns v. Reidy*, 135 Ill. 119; *Gage v. Du Puy*, 137 Ill. 652; *Burton v. Perry*, 146 Ill. 71; *Allen v. Frazee*, 85 Ind. 283; *Zeigler v. Mize*, 132 Ind. 403; *Bowser v. Patrick*, 65 S. W. Rep. (Ky.) 824; *Gilkeson Co. v. Bond*, 44 La. Ann. 481; *Brinley v. Whiting*, 5 Pick. 348; *Robertson v. Blewett*, 71 Miss. 409; *Bent v. Priest*, 86 Mo. 475; *Bick v. Overfelt*, 88 Mo. App. 139; *Chamberlain v. Grimes*, 42 Neb. 701; *Taylor v. Gilman*, 58 N. H. 417; *Connecticut Ins. Co. v. Way*, 62 N. H. 622; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Hall v. Gird*, 7 Hill, 586; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1; *Potter v. Ajax Mining Co.*, 22 Utah, 273; *Davis v. Settle*, 43 W. Va. 17, *acc.* See also *Euneau v. Rieger*, 105 Mo. 682; *Cooke v. Pool*, 25 S. C. 593.

Keiper v. Miller, 68 Fed. Rep. 627, 70 Fed. Rep. 128; *Greenman v. Cohee*, 61 Ind. 201; *Stewart v. Welch*, 41 Ohio St. 483; *Webb v. Armstrong*, 5 Humph. 379; *Barker v. Barker*, 14 Wis. 131; *Kelly v. Kelly*, 86 Wis. 170, *contra.* See also *Brown v. Ginn*, 66 Ohio St. 316.

(b) AGREEMENTS TO STIFLE PROSECUTION.

**HENRY WILLIAMS AND OTHERS, APPELLANTS, v. JAMES
BAYLEY, RESPONDENT.**

IN THE HOUSE OF LORDS, JUNE 14, 15, 18, 19, 21, 1866.

[Reported in Law Reports, 1 House of Lords, 200.]

THIS was an appeal against a decision of Vice-Chancellor Stuart, by which certain agreements given by the respondent to the Appellants were declared void, and were ordered to be delivered up.

The appellants were bankers at Wednesbury, in Staffordshire. The respondent carried on the business of a coalmaster near that place, and he also occupied a large farm at Knowle, in Warwickshire. One of his sons, William Bayley, had been for some years in business as a dealer in coal and coke at West Bromwich, and at Birmingham. The respondent had for years kept an account at the bank of the appellants, and often had a considerable balance to his credit. In April, 1862, William Bayley opened an account at the appellant's bank. William Bayley had often been a purchaser of coal from his father, and in that way many transactions on promissory notes had occurred between them. Notes, too, had been passed by William Bayley into the appellant's house, and had of late often borne the indorsement of the respondent.

On one or two occasions these notes had been dishonored, and the appellants had given formal notice to the respondent of the fact. On the 6th of January, 1863, an event of that kind occurred, with respect to a note for £247. The respondent, who seemed to have believed it to relate to a note he had indorsed, mentioned the matter to his son, who promised to provide for it. On the day following the notice, it was provided for by William Bayley depositing with the appellants another note of the same amount, without the respondent being farther troubled about the matter. William Bayley, however, had, without his father's knowledge, sent to the bank many notes apparently indorsed by his father, but of which the indorsements were forgeries by himself, and their amount at last reached a considerable sum. Suspicion having been excited, application was urgently made by the appellants to the respondent for a settlement, and this application produced the discovery that William Bayley had, in many instances, forged the indorsements of his father, whose liabilities, so created, had become very large. On the 18th of April, 1862, in consequence of communications made to him, the respondent called, in company with his son, Thomas Abishal Bayley, at the appellant's bank, and had an interview with Mr. Deakin, their manager, when the manager stated that William Bayley's liabilities were serious, but if he would act properly, and his friends would back him, all would be right. At this interview the respondent disa

tinctly denied that he had ever given his son authority to make these indorsements, and, on being informed that the amount was £6,000 or £7,000, said that he was an old man, and could not be expected to beggar himself, but was willing to do anything to assist in reason, and Deakin said that Messrs. Williams did not wish to exercise any pressure upon him.

On Monday, the 20th of April, there was a meeting of all the parties at the bank of the appellants, when some statements were made as to William Bayley's means of meeting the notes which were out. At that meeting the respondent, addressing his son, said, "Now, William, don't deceive the gentlemen, you say you can pay them £1,000 a year?" To which William Bayley answered, "Yes, father, I can." Philip Williams (one of the appellants) thereupon said, "We shall have nothing to do with any £1,000 a year. If the bills are yours" (addressing the respondent) "we are all right; if they are not, we have only one course to pursue; we cannot be parties to compounding a felony." There was afterwards a conversation, in the course of which the solicitor for the bankers said it was "a serious matter;" and the respondent's solicitor added, "a case of transportation for life." Then there was a discussion about the means of meeting the difficulties in which William Bayley was placed by a partnership between him and his brother Thomas Abishai Bayley; and then again, by some charge upon his wife's property; but throughout all the conversations which took place, the respondent never admitted any one of the indorsements to be his, or to have been authorized by him. Finally, after discussions of this kind, the solicitor for the appellants expressed his belief that William Bayley's wife had no such interest in property as could be made a valid security, and said that they had been brought to the point from which they started, and could only look to the respondent. The respondent's solicitor, Mr. Duignan, refused to be a party to the respondent making himself liable for the whole amount, and prepared to leave the room where the interview took place, when the respondent (as it was alleged) said, "What be I to do? How can I help myself? You see these men will have their money." Mr. Duignan did leave the place, and after he had gone the following agreement was drawn up by the solicitor for the appellants:—

"Wednesbury Bank, 20th April, 1863. To Messrs. Philip and Henry Williams, bankers, Wednesbury. In consideration of your consenting to give up to me the several under-mentioned bills and promissory notes, I hereby charge all that my colliery, situate at Tipton, in the county of Stafford, and known as the Tipton Meadow Colliery, with the engines, fixtures, and apparatus thereto belonging, and all other the hereditaments and premises described in the title deeds hereinafter mentioned, with the payment to you of £7,203 14s. 6d., being the amount advanced by you on the said bills and notes. And I hereby agree to pay to you the said sum of £7,203 14s. 6d., and I agree to deposit with you the several title deeds and writings relating to said Tipton Meadow

Colliery by way of equitable mortgage, for securing payment to you of the said sum of £7203 14s. 6d."

To this agreement a list of notes, making up this amount was appended. These notes were delivered up to the respondent. On the following day the respondent deposited with the appellant's solicitor a bundle of deeds. It turned out that all the proper deeds had not been brought. The others were afterwards brought, and a more formal agreement, but exactly to the same effect, was prepared by the solicitors for the appellants, and was signed by the respondent on the 22d of April, 1863.

On the 25th of April, 1863, the respondent drew a check on the appellants' bank for £5,000, in order to transfer that sum to the bank of Messrs. Duignan & Co., at Walsall. This check was returned by post. On the same day the respondent's solicitor wrote a letter complaining of the agreement which had been entered into against his advice, declaring it to have been obtained under influences improperly exercised, and announcing that he had been instructed to apply for the restoration of Mr. Bayley's deeds, and offering to return "the documents" [the notes] which Mr. Bayley had received from the appellants. This was refused.

On the 27th of April, 1863, William Bayley was adjudicated a bankrupt, on the petition of the respondent; he had absconded two days before that time.

On the 1st of May, 1863, the respondent commenced an action in the Court of Exchequer against the appellants, to recover a sum of £6,704 13s. 9d., being the balance standing in his name in the books of the appellants' bank, and also for dishonoring his check for £5,000.

On the 19th of May, 1863, the appellants brought an action in the Court of Queen's Bench to recover the amount claimed by them on the agreement of the 20th of April.

The respondent filed his bill, which was amended and re-amended in the Court of Chancery, setting forth the above transactions, and praying that the agreements, dated on the 20th and 22d of April, might be declared invalid, and be ordered to be delivered up to be cancelled. Answers were put in and evidence taken, and the cause came on for hearing before Vice-Chancellor Stuart, who, on the 7th of March, 1865, made a decree to that effect, and directed the respondent to deliver up to the appellant the notes in respect of which the agreements had been made. This appeal was then brought.

Sir *H. Cairns*, Q. C., and Mr. *E. K. Karslake* (Mr. *Kingdon* was with them), for the appellants:—

The mistake of the Vice-Chancellor was this, he assumed that all the negotiations were on the footing of the indorsements being forgeries. That was not so. The appellants did not know that they were forgeries, and had reason to believe that the acts of William Bayley had been done with the knowledge and assent of the respondent, although it was possible that in the amounts he might have exceeded his authority.

The father's silence after notice encouraged this belief. The dealings between the parties were therefore always on the footing of the settlement of a simple civil liability. Asserting that, as between themselves and the respondent, the respondent was liable, the appellants also believed that William was liable to the respondent, and were quite willing to join in any arrangement by which that liability might be satisfied. This was the first object of the negotiations. It was found that William had not the means of giving the proper security, and then it was arranged that the appellants should give up the notes to the respondent, he giving them security for their amount, so that he would then be put in the best position to assert his claims against his son. The only pressure exerted on the respondent was the pressure of a civil liability, which by his own conduct he had incurred. [LORD CHELMSFORD. — In their answer the appellants never suggest that the respondent was civilly liable.] One test of the true nature of the transaction is this: suppose it was legal to compromise a felony, and to allege such compromise as a ground of liability, there was nothing done here which could support such an allegation. In fact there was no such compromise. In a case of this kind which occurred before Lord Ellenborough, *Wallace v. Hardacre*, 1 Camp. 45, his lordship said that if any act could be shown which was done to stifle a prosecution, the action could not be maintained, but otherwise, the mere substitution of good notes for those which had been forged would not invalidate the plaintiff's right to recover upon them. There was no attempt here to stifle a prosecution; all that was done was to enforce an existing civil liability. In *White v. Spettigue*, 13 M. & W. 608, trover was held to be maintainable to recover the value of goods which had been stolen from the plaintiff, though he had not then taken any steps to prosecute the thief. In that case there was no antecedent debt, as there was here, and that circumstance made the decision in *Chowne v. Baylis*, 31 Beav. 351, that the civil remedies are suspended until after the conviction of the felon, inapplicable, for there the only debt was that which was constituted by the felony of the clerk. In the *Dudley and West Bromwich Banking Company v. Spittle*, 1 J. & H. 14, where the debt likewise arose out of the felonious act of the debtor, the general right to sue in respect of it was not denied, though it was held that the civil remedy was suspended till the prosecution was instituted. *Stone v. Marsh*, 6 B. & C. 551, which afterwards came up to this House, *Nom. Marsh v. Keating*, 2 Cl. & F. 250, established the doctrine that civil remedies might exist in cases where felonious acts had been committed. The authorities on the criminal law, Hale, Book 2, c. x.; Hawkins, Book 1, c. vii.; and Russell, vol. ii. 741-2, Greaves' ed., all showed that there must be a knowledge that a felony had been committed before there could be any misprision of felony, for that phrase meant the knowledge that there had been a felony, and the wilful attempt to conceal it. Here the appellants had reason to believe that whether the name of the respondent was written by himself or not, it was written upon sufficient author-

ity from him in the course of the dealings in which both father and son were engaged. The courts would not presume that an agreement of this kind was corrupt, but would require distinct evidence that it was so. *Ward v. Lloyd*, 6 Man. & G. 785; *Reg. v. Hardey*, 14 Q. B. 529, proceeded on the principle that though indictments, even for misdemeanors, could not be the subject of a reference, still where a verdict of acquittal was taken on them, because no evidence to sustain them was produced, there was nothing illegal in referring at the same moment all matters in difference between the parties, though such matters were those which had constituted the groundwork of the indictment. In *De Tastet v. Carrol*, 2 Rose, 462; 1 Stark. 88, it was held that a transfer of property to a creditor, made on the eve of bankruptcy, under fear of criminal proceedings, is valid.

The *Attorney General* (Sir R. Palmer), and Mr. F. W. E. S. Everitt, for the respondent:—

It is impossible to doubt that when a father knows that his son has committed forgery the holder of the forged instrument possesses a power, and exercises an influence over him, which the law considers undue pressure, and therefore will not allow securities obtained from him under such pressure to be enforced against him. In *Ex parte Critchley*, 3 Dowl. & L. 527, a charge of embezzling was pending: the magistrate doubted whether there was not a partnership between the prosecutor and the accused. A warrant of attorney was given to secure payment of the money charged to have been embezzled, and the charge was withdrawn. It was held that the warrant of attorney was invalid, because at the time of giving it a charge of a criminal nature was pending which it was calculated to bring to an end. A similar principle was acted on in *Osbaldiston v. Simpson*, 13 Sim. 513, where the alleged offence was cheating at cards, and the punishment would only have been a liability to penalties under the 9 Anne, c. 14. Even in matters not absolutely criminal, but which are prohibited, the law will not allow itself to be thus defeated by private agreements. In *Osborne v. Williams*, 18 Ves. 379, a father commanded a post-office packet; with the approbation of the Postmaster-General he sold it to his son, but, by a private agreement between the father and the son, the latter was only to hire the vessel at a settled rent, being allowed £200 per annum for the command. This was held to be a fraud on the Ship Registry Acts, and an account was decreed. That shows that the argument of *in pari delicto* would not prevent the application of the general rules of law in such a case. Where a transaction is contrary to public policy it will not be binding, *Neville v. Wilkinson*, 1 Bro. C. C. 543. *Walker v. Hardacre*, 1 Camp. 45, is not in point. All that was done there was merely to substitute good notes for bad ones. Of course there could be no difficulty in suing on the good notes. And *Ward v. Lloyd*, 6 Man. & G. 785, is not applicable to this case, for there the debtor was merely making a provision for his own lawful debt; he himself denied that he had ever been in fear of a prosecution; and the court did not think

there was sufficient evidence of the fact of a corrupt agreement. Here there was no debt by the respondent; his name had been forged, and forgery cannot create a debt. In *Roche v. O'Brien*, 1 Ball & Bea. 330, a reversionary grant obtained by fraud was set aside, though it had been thirty-four years in existence, and had been confirmed by subsequent acts; and a deed confirming a grant impeached by suit, and compromising rights, the subject of the suit, though obtained from a person apprised of his rights, was set aside, he being compelled to accede to the terms from distress and poverty, occasioned by the party procuring the confirmation. There *Martin v. Littlehales*, 1 P. Wms. 75, n., was referred to, where bonds had been executed, against which relief was given, because the party executing them was under difficulties, and was not then *sui juris*. If that was so in a matter where merely civil rights were concerned, how much more strongly would that principle apply where the party executing an agreement like this was under the influence of a fear of a criminal prosecution, a prosecution for forgery, against his own son! The pressure that could be exerted on a father under such circumstances is enormous. It is against public policy to allow such an agreement, so obtained, to be valid. In all the cases the consideration of public policy was a great ingredient in the decision. On public policy the decision in *Egerton v. Brownlow*, 4 H. L. C. 1, wholly proceeded. All these cases were considered in the *Dudley and West Bromwich Banking Company v. Spittle*, 1 J. & H. 14, where it is true that the civil remedy was said to be only suspended, but where all that was done to enforce a civil remedy was done after the party had first discharged his duty to the State by instituting criminal proceedings. *Chowne v. Baylis*, 31 Beav. 351, likewise treated the civil remedy as only suspended, but there the offender was prosecuted and convicted before the debt was attempted to be enforced. Here there can be no doubt that the scheme was to suppress or stifle a prosecution, and that all the parties proceeded with a view to accomplish that object. Agreements made with such an object are void.

Sir *H. Cairns* replied.

THE LORD CHANCELLOR (LORD CRANWORTH).¹ My Lords, although the facts of this case are somewhat complicated, and extend over a considerable length of time, I do not think it is necessary, in giving the advice I am about to tender to your Lordships, that I should go into any detail of the facts, because, having occupied the consideration of the House for two or three days, they are, I am quite sure, present to the minds of all persons concerned. It will be sufficient, I think, to start from this point, that on Friday, the 17th of April, 1863, the father being at a railway station, and circumstances having arisen which caused these bankers to have doubts about the signatures to certain bills or promissory notes, and the bankers wishing to satisfy themselves whether a signature was, as it purported to be, that of the father, James Bayley, they presented to him a note for £500 made

¹ LORD CHELMSFORD and LORD WESTBURY delivered concurring opinions.

by the son, and purporting to contain the father's signature, and asked him whether that was his signature. The father denied it. The bank manager, who was present, was much surprised to find that the signature was not correct, and it was arranged that the matter should be looked into, that it should stand over then, and that there should be another meeting with the parties on the following day. It appears that, in the course of the evening of that day, the son, William Bayley, was communicated with. He was informed of what had taken place; and, I suppose, the conclusion was come to in the family that the son had been in the habit of using his father's name without his sanction. I say "using his father's name without his sanction," for I have no doubt at all in coming to the conclusion (there is not a tittle of evidence to the contrary) that all these signatures were forgeries. That they were not the signatures of the father is clear, and I do not think there is the smallest reason to suppose that he ever gave his son any express or implied authority to sign the bills in his name.

This matter appears to have come to the knowledge of the family on the evening of the same day. One member of the family, Thomas Abishai Bayley (another son of the respondent and brother of William), who is not at all involved in these transactions, went with his father to the bank, and then considerable negotiation took place. It is obvious that at that time the bankers must have seen that they were in great jeopardy as to the notes, and that they would probably lose their money unless the father came in and assisted the son. I cannot, however, but come to the conclusion, from the evidence, that they strongly suspected, indeed they must be said to have known, that these signatures were forgeries. If the signatures were forgeries, then the bankers were in this position, that they had the means of prosecuting the son. That was clear.

Now the question is, what was the sort of influence which they exercised on the mind of the father to induce him to take on himself the responsibility of paying these notes? Was it merely, "We do not know these to be forgeries, we do not believe them to be so, but your son is responsible for them, and if you do not help him we must sue him for the amount"? Or was it, "If you do not pay these notes we shall be in a position to prosecute him for forgery, and we will prosecute him for forgery"? What is the fair inference from what took place?

I do not know what may be the opinion of the rest of your Lordships, but I very much agree with the argument of Sir Hugh Cairns, that it is not pressure in the sense in which a court of equity sets aside transactions on account of pressure, if the pressure is merely this: "If you do not do such and such an act I shall reserve all my legal rights, whether against yourself, or against your son." If it had only been, "If you do not take on yourself the debt of your son, we must sue you for it," I cannot think that that amounts to pressure, when parties are at arms' length, and particularly when, as in this case, the party supposed to be influenced by pressure had the assistance of his solicitor, — not, indeed, on the first occasion, but afterwards, before anything was done. But

if what really takes place is this: "If you do not assist your son, by taking on yourself the payment of these bills and notes on which there are signatures which are said, at least, to be forgeries, you must not be surprised at any course we shall take," meaning to insinuate, if not to say, "we shall hold in our hands the means of criminally prosecuting him for forgery," — I say, if it amounts to that, that it is a very different thing. When the parties met on Saturday there was a very significant expression made use of by Mr. Deakin, the manager, in the presence of one of the bankers, Henry Williams: "We do not wish to exercise pressure on you if it can be satisfactorily arranged." Does the "pressure" mean a pressure arising from our exercising the power, or keeping in our hands the means of exercising the power, of instituting a criminal prosecution? Or does it mean the "pressure" of getting you to make yourself responsible for your son's debt? It must have meant the former, because the context shows that the other was alternatively provided for. When it was said, "We do not wish to exercise pressure if it can be satisfactorily arranged," that could not mean, "If you take on yourself the debt, without pressure, we don't mean to press you." That would be nonsensical. But, on the other interpretation of the words, the sense is very plain: "If you can satisfactorily arrange this, and if you choose" (according to another expression that was used) "to treat it as a matter of business," that is, to take upon yourself the debt, we will not exercise "pressure." Of course not. The "pressure" there referred to must be something different from merely obtaining the security of the father. It amounts to this: "Take your choice: give us security for your son's debt. If you take that on yourself, then it will all go smoothly; if you do not, we shall be bound to exercise pressure;" which could only mean, "to exercise those rights which remain to us, by reason of our holding signatures forged by your son."

That is what took place on the 18th. It was then arranged that there should be another meeting on the 20th. It was urged in the argument, that the bankers could not have contemplated a prosecution, because they allowed two days to elapse, during which the son might have escaped. But all parties supposed that the father could prevent the prosecution by giving what the bank required. On Monday, the 20th, the parties met; the father, the son, and other members of the family, with the father's solicitor, all met at the bank office. On that occasion farther conversation takes place. There had been some negotiations going on, to see how the debts of the son could be met or satisfied, what assets he had, and so forth. The father said something about the son paying the bankers by instalments of £1000 a year. To which one of the bankers answered, "We shall have nothing to do with any £1,000 a year. If the bills are yours" (addressing the plaintiff) "we are all right. If they are not, we have only one course to pursue; we cannot be parties to compounding a felony." Now, according to my interpretation of the law, it does not amount to com-

pounding a felony. But one sees clearly what the parties meant. It was this: If you choose to take on yourself the responsibility of these bills, all will be right; but if not, we cannot be parties to what they call "compounding a felony;" but what Lord Ellenborough more correctly called "stifling a prosecution." I think that it is the only interpretation that can possibly be put on what passed. Then, in the course of this same conversation, the solicitor of the bankers said, "Yes, it is a serious matter," and Mr. Duignan remarked, "It is a case of transportation for life." Now that was said in the hearing of the bankers. They must have heard it. They must have known, while all these negotiations were going on, that all the parties to them understood that this was a case, not of life or death, but of transportation for life. The father, then, was acting in this matter under the notion that if he did not interfere to save his son, the latter would be liable to be prosecuted, and probably would be prosecuted for forgery, and so be transported for life.

Then that being, as I think, the clear inference from all the evidence, the question arises: What is the law applicable to such a case? These bankers hold a number of acceptances which one can hardly suppose they did not believe to be forged acceptances. I say that because they never suggest any doubt on the subject. Although the bill of the plaintiff was amended and re-amended, and in the last re-amended bill there is a special charge that the bankers never suggested that the notes, which certainly were not in the plaintiff's handwriting, were signed with the privity of the plaintiff, the bankers, in answering that bill, never deny that; but, on the other hand, one of the witnesses, Thomas Bayley, I think, says that during the whole meeting no such suggestion was ever made. I asked Sir Hugh Cairns, in the course of his argument this morning, if he could point out any suggestion of that kind as having been made; but the only approach to such a suggestion that he could refer to was a question addressed to the father, as to one of the notes, to this effect: "Why did you not answer the letter informing you that it was dishonored?" It is very true that lawyers might fully understand what that might mean, but I cannot think that that could possibly be understood by the parties as amounting to this, that we do not admit that these indorsements, though not in your handwriting, were not signed by your authority. I think that is an inference which, under all the circumstances of this case, never could be dreamt of as deducible from what so passed. That being so, I think the case in point of fact is this: Here are several forged notes. The bankers, in the presence of the father and of the person who forged them, both being persons of apparent respectability in the country, carrying on business as tradesmen, and the father having the presence and the assistance of his solicitor, the bankers say to him what amounts to this: "Give us security to the amount of these notes, and they shall all be delivered up to you; or do not give us security, and then we tell you we do not mean to compound a felony; in other words, we mean to prosecute." That

is the fair inference from what passed. Now is that a transaction which a court of equity will tolerate, or is it not? I agree very much with a good deal of the argument of Sir Hugh Cairns as to this doctrine of pressure. Many grounds on which a court of equity has acted in such cases do not apply in this case. The parties were not standing in any fiduciary relation to one another; and if this had been a legal transaction I do not know that we should have thought that there was any pressure that would have warranted the decree made by the Vice-Chancellor. But here was a pressure of this nature. We have the means of prosecuting, and so transporting your son. Do you choose to come to his help and take on yourself the amount of his debts, — the amount of these forgeries? If you do we will not prosecute; if you do not we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion, my Lords, I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers; and I come to that conclusion upon this short ground, that in *Wallace v. Hardacre*, 1 Camp. 45, although the decision there, founded upon the facts of that particular case, was against the view I am taking, yet there Lord Ellenborough positively states that which has always been understood to be the correct view of the law upon this subject, namely, that although in that case there was no reason for treating the agreement as invalid, yet it would have been otherwise if the agreement had been substantially an agreement to stifle a criminal prosecution. And although that was merely a dictum in a *nisi prius* case, yet on all occasions I have found, on looking at the reports, by the late Lord Campbell, of Lord Ellenborough's decisions, that they really do in the fewest possible words, lay down the law, very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognized as giving a true view of the law as applied to the facts of the case. Now, is the agreement in question, or is it not, one the object of which is to stifle a criminal prosecution? If there be any case in which that character can be properly given to an agreement I think that this is such a case, and therefore, in my opinion, the decree is perfectly right. Yet I am bound to say, speaking only for myself, I do not think that on the mere grounds upon which it is put by the Vice Chancellor I should have been inclined to concur with him. At the same time, he, having the whole of the facts before his mind, came substantially to the same conclusion, although he did not express exactly the same grounds on which I rest the propriety of the decree. I have, therefore, no hesitation in moving your Lordships that this appeal be dismissed with costs, and that the decree be affirmed.¹

¹ Many cases in accord are collected in 26 L. R. A. 48, *note*. Later decisions are *Loand v. Grinwade*, 39 Ch. D. 605; *Windhill Board of Health v. Vint*, 45 Ch. D. 851; *Jones v. Merioneth Building Soc.*, [1891] 2 Ch. 587, [1892] 1 Ch. 173; *United*

FLOWER AND OTHERS v. SADLER.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL,
JUNE 29, 1882.

[Reported in 10 Queen's Bench Division, 572.]

APPEAL by the defendant from the judgment of Denman, J., in favor of the plaintiffs.

The facts are fully stated in the judgment of Denman, J., 9 Q. B. D. 83; and it is here necessary only to give the following short statement of them:—

(Maynard had been employed to collect rents on behalf of the plaintiffs; he failed to account for a large sum, and the plaintiffs threatened to prosecute him for embezzlement.) Maynard afterwards indorsed to the plaintiffs certain bills of exchange drawn by him upon, and accepted by, the defendant; the consideration for the defendant's acceptance was the sale to him by Maynard of a share in a patent. The indorsement of the bills of exchange by Maynard to the plaintiffs was not done under the influence of the plaintiffs' threat, and was a free and *bonâ fide* transaction.

Fullarton, for the defendant. The plaintiffs had threatened to prosecute Maynard for embezzlement. This threat was sufficient to vitiate any security subsequently given by Maynard for the debt due from him; (in fact the indorsement of the bills to the plaintiffs was an act done to stifle a prosecution for felony, and therefore the plaintiffs cannot sue upon them) Keir v. Leeman, 9 Q. B. 371; Williams v. Bayley, L. R. 1 H. L. 200. In giving judgment, Denman, J., relied upon Ward v. Lloyd, 7 Scott, N. R. 499; but that case is distinguishable in its facts, and moreover is not binding since Williams v. Bayley, L. R. 1 H. L. 200. Further, the learned judge drew a wrong inference as to the facts; the bills of exchange were delivered by the defendant to Maynard to be discounted; they were not accepted by the defendant in payment of a share in a patent sold to him by Maynard.

Finlay, Q. C., was not called upon to argue for the plaintiffs.

LORD COLERIDGE, C. J.¹ I think that the judgment of Denman, J., is right, and ought to be affirmed. The action is brought upon three bills of exchange. The defendant has alleged that he handed them to Maynard in order to be discounted, but Denman, J., has found that

States Fidelity Co. v. Charles, 131 Ala. 658; Jones v. Dannenberg Co., 112 Ga. 426; Buffalo Press Club v. Greene, 26 N. Y. Supp. 525, 33 N. Y. Supp. 286; Insurance Co. v. Hull, 51 Ohio St. 270; Riddle v. Hall, 99 Pa. 113, acc. See also Weber v. Shay, 56 Ohio St. 116; City National Bank v. Kusworm, 88 Wis. 188; Mack v. Prang, 104 Wis. 1.

Allen v. Dunham, 92 Tenn. 257, 269; Loud v. Hamilton, 45 L. R. A. 400 (Tenn.), *contra*.

¹ BRETT, L. J., and COTTON, L. J., delivered concurring opinions.

the bills of exchange were accepted upon a good consideration, that is, for the purchase of a share in a patent. (Maynard had been employed in a situation of trust, and had been guilty of a breach of duty; the plaintiffs had threatened him with a prosecution, and had used strong expressions with reference to his conduct.) The bills were then delivered over to the plaintiffs. The question is, whether a defence arises upon these facts. It is said that the consideration for the transfer of the bills of exchange to the plaintiffs was the compromise of criminal proceedings, and that they were not the lawful indorsees of them. (Upon the facts of the case there is no foundation for this argument; there was no agreement to stifle a prosecution for felony.) The evidence fails to disclose even a vestige of an agreement of that kind; the form and the subject of the transaction was different. The plaintiffs used threats to Maynard, but they did not come to an agreement with him not to prosecute him. (A creditor may use strong expressions and even threats) and it was held in *Ward v. Lloyd*, 7 Scott, N. R. 499, that strong language is not conclusive evidence of an agreement to compound a felony or to stifle a prosecution. Both the facts and the law fail to support the case for the defendant. In *Keir v. Leeman*, 9 Q. B. 371, it was held by the Court of Exchequer Chamber, upon error from the Court of Queen's Bench, that the compromise of a prosecution for an assault, coupled with riot and the obstruction of a public officer, was illegal; but Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, said (9 Q. B. 395): 'We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit.' (I think that upon the authorities there can be no question that the plaintiffs had a right to take security for the debt due from Maynard; it is open to any creditor to obtain payment of a debt justly due to him.) (We have been referred to *Williams v. Bayley*, L. R. 1 H. L. 200; as that was a decision of the House of Lords, we should of course submit to it; but the principle of law there laid down is not applicable to the present case; for the plaintiff in the suit in the Court of Chancery sought to enforce the delivery of certain securities obtained from him without consideration. It is plain that there was no consideration for the plaintiff in that suit rendering himself liable for the debts of his son. The state of facts was different. I do not understand that any alteration of the law was caused by the decision in that case. I do not understand that the opinions of the Law Lords interfered with the general principles as to the right of a creditor to secure payment of his debt. (A creditor has a perfect right to recover his debt by action; and upon this ground I think that the judgment of Denman, J., must be affirmed. The view taken by the learned judge, both as to the law and as to the facts, was correct.¹

¹ *McClatchie v. Haslam*, 65 L. T. 691; *Paige v. Hieronymus*, 192 Ill. 546; *Powell v. Flanary*, 109 Ky. 343; *Thorn v. Pinkham*, 84 Me. 101; *Beath v. Chapoton*, 114 VOL. II. — 29

WILLIAM B. NICKELSON v. GEORGE A. WILSON.

NEW YORK COURT OF APPEALS, FEBRUARY 24 — APRIL 13. 1875.

[Reported in 60 New York, 362.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court at Special Term. (Reported below, 1 Hun, 615; 4 N. Y. S. C. [T. & C.] 104.)

This action was brought for the specific performance of a contract, and to restrain defendants from enforcing a judgment against plaintiff in alleged violation of said contract.

The court found substantially the following facts:—

On the 25th day of May, 1869, plaintiff sold a certain patent-right to the defendant Wilson and one J. Goodrich Scott, for \$12,000, each agreeing to pay one half. Wilson gave his promissory notes, to the amount of \$6,000, of which sum the plaintiff had \$3,000, and Scott \$3,000. After such sale, Wilson, claiming a fraud had been practised on him by the plaintiff and Scott, and that said notes had been obtained of him by means of false pretences, commenced an action in the Supreme Court against them, to recover the amount of the notes, alleging they had been transferred to *bond fide* purchasers. Wilson also made a complaint before a grand jury, against the plaintiff and Scott for such alleged false pretences, and they were indicted therefor. Scott subsequently caused a petition in bankruptcy to be filed to have Wilson adjudged a bankrupt; and evidence was taken before one of the registers in bankruptcy to sustain the petition. Plaintiff and Wilson authorized their counsel to do any act, or perform any act, or make any agreement to further the interests of their clients in said litigations, and defence of the suit and proceedings. Wilson's counsel was the district attorney. Said counsel entered into an agreement substantially set forth in a memorandum made at the time as follows:—

“February 14, 1870.

“1. Nickelson will testify to all he knows in bankrupt case, in civil case, and in the criminal case.

“2. If there is no recovery against Scott in the civil action, there shall be none against N.

“3. The civil case going to judgment against S. and N., the judgment shall not be enforced against N. for more than \$1,000, and this \$1,000 may be paid in one of Wilson's notes for that sum.

“4. Nickelson shall be given the control for his benefit of judgment against Scott for whatever sum he has to account for to Wilson.

“5. Nickelson testifying fully as above, the counsel will recommend *nol. pros.* against Nickelson.”

Mich. 506; Cass County Bank v. Brickner, 34 Neb. 516; Barrett v. Weber, 125 N. Y. 18; Fortner v. Kirschner, 169 Pa. 472, acc.

The clients were not informed of the full details of said agreement, but plaintiff followed the direction of his counsel, and in pursuance of such agreement waived his personal privilege, and testified as a witness on behalf of Wilson in the civil case, and in the bankruptcy proceedings, and also on the trial of said indictment, having been called by the district attorney. In the action for damages, Wilson recovered a judgment against Scott and Nickelson for the amount of the notes upon which plaintiff paid \$1,000, but Wilson and defendant Baker, his assignee in bankruptcy, refused to release plaintiff from the judgment, or to transfer an interest therein.

The court further found "that the object and intent of the agreement was to stifle, embarrass, and to procure a discontinuance of the criminal proceedings pending against Nickelson at the time the agreement was entered into by the counsel as aforesaid." And, as conclusion of law, "that the agreement was against public policy, and void."

C. D. Adams, for the appellant.

Watson M. Rogers, for the respondents.

RAPALLO, J. The court, at Special Term, found that the object and intent of the agreement which the plaintiff seeks to enforce in this action was "to stifle, embarrass, and procure the discontinuance of the criminal proceedings pending against the plaintiff." On this ground it decided that the agreement was against public policy and void, and this decision was affirmed by the Supreme Court at General Term.

The only evidence upon which the finding was based consists of the written agreement and the testimony of the plaintiff's counsel as to the negotiation of which that agreement was the result. The plaintiff claims that this evidence is wholly insufficient to sustain the finding, or, in other words, that the finding is unsupported by any evidence.

The feature of the written agreement relied upon on the part of the defendants, as establishing the illegal intent, is the fifth clause, which provides that, "Nickelson testifying fully as above, the counsel will recommend *not pros.* against Nickelson."

The preceding part of the agreement referred to provided that Nickelson should testify to all he knew in the bankrupt case, the civil case, and the criminal case. [The performance of this agreement involved a waiver by Nickelson of his personal privilege of declining to answer questions, his answers to which might tend to criminate him; and this waiver constituted the consideration for the whole agreement.] There was nothing in the written agreement engaging the prosecutor to forbear bringing the indictment to trial against both of the accused, to withhold or suppress any evidence against the plaintiff, nor to interfere with the course of justice in any way. So far as can be gathered from the written agreement the object of the prosecutor was to obtain evidence upon which one, at least, of the accused might be convicted. The disposition of the other was to be left to the discretion of the court, and to depend upon the frankness with which he should testify. The prosecutor, who knew the facts as well as the accused, was competent to

determine whether or not the testimony of the plaintiff was full and true; and if so, he agreed to intercede with the court for his discharge. On this assurance the plaintiff consented to incur the hazard of a full disclosure. Nothing more can be spelled out of the written agreement. The inference that indirect means or any others than those expressed in the agreement were to be employed to procure the discharge of the plaintiff, or to stifle or embarrass the prosecution against him, seems to us unwarranted and illegitimate.

The testimony of Mr. Starbuck, who was counsel for the plaintiff and made the agreement in his behalf, adds no force to the defendant's position. His object, undoubtedly, was — and in this he only performed his duty to his client — to secure to him by fair and legal means, and with the approval of the court, immunity from his offence, if he had committed one, in consideration of his making full disclosure. The testimony of Mr. Starbuck, giving to it all the effect claimed by the defendants, amounts to nothing more than that, as a condition for agreeing to advise his client to expose himself to the peril of waiving his privilege and testifying to matters by which he might criminate himself, he exacted the promise of his adversary that if, under the advice of him, Starbuck, Nickelson should thus waive his privilege and state the whole truth, the counsel of the prosecutor would unite with him, Starbuck, in a recommendation to the court that a *nolle prosequi* be entered against Nickelson. It also appears from the testimony of Mr. Starbuck that the plaintiff was not even informed of the arrangement, but placed his case in the hands of Mr. Starbuck, agreeing to do whatever he should advise, without asking any questions; and that when he gave his evidence he did not even know of the agreement to recommend a *nolle prosequi*. The counsel for the prosecutor was also district attorney of the county.

It cannot justly be deduced from this statement that any means were agreed to be employed to obtain the discharge of Nickelson other than by openly, and in accordance with the well known and established practice prevailing in courts of criminal jurisdiction, invoking the action of the court in favor of an accomplice or co-defendant in a criminal indictment, of whose testimony the government avails itself for the purpose of securing the conviction of his confederate in the same crime.

The promised interposition in behalf of the plaintiff was upon the condition that he should testify to all he knew. The arrangement had not in view the suppression of any evidence, but rather the eliciting of the truth; and the recommendation which the prosecutor agreed to give if the plaintiff should testify fully was simply that the course which was usual in such cases should be pursued. The plaintiff could not be called as a witness on the trial of the indictment except with the assent of the district attorney, and it was even then discretionary with the court whether or not to admit him to testify. If he appeared to be the principal offender he would be rejected. If the court admitted him, and he testified fully and candidly, there was an implied promise of immu-

nity on the part of the government. *People v. Whipple*, 9 Cow. 713, 716. Where the State desires to call as a witness one of several defendants, jointly indicted and tried, this can be done only by discharging the witness from the record, as by the entry of a *nolle prosequi*, etc. 1 Greenl. Ev. § 363. (If an accomplice be admitted to testify, and appears to have acted in good faith in giving testimony, the government is bound in honor to discharge him) *U. S. v. Lee*, 4 McLean, 103. The English practice under such circumstances is, when the witness makes a clean breast, to grant a pardon. The admission of accomplices as witnesses for the government is justified by the necessity of the case, it being often impossible to bring the principal to justice without them. 1 Greenl. Ev. § 411. It is difficult to see how an arrangement for obtaining evidence of this description, on the usual terms, and subject to the control of the public prosecutor and of the court, can be violative of any rule of public policy. In my judgment, public policy requires that good faith be observed with persons charged with crime, who are induced to testify under such circumstances.

The cases relied upon on the part of the defence are of a totally different character; they are cases of agreements between the criminal and the prosecutor, whereby, in consideration of some compensation or reward given by the criminal, the prosecutor agrees to forbear the prosecution, or to suppress or destroy evidence which might lead to a conviction. The statutes against compounding felonies and misdemeanors point out very distinctly the character of that offence. 2 R. S. 689, §§ 17, 18; 692, § 12. They prohibit the taking of any money, property, gratuity, or reward, or any engagement or promise therefor, upon any agreement or understanding to compound or conceal a crime, abstain from prosecuting, or withhold evidence. These are the acts by which the course of justice may be interfered with and prosecutions may be stifled or embarrassed. And in all the cases which have been cited some of these vicious elements existed and appeared. In the often cited case of *Collins v. Blantern*, 2 Wilson, 343, 349, a promissory note was given by a friend of the accused in consideration of the agreement of the prosecutor not to appear and give evidence on a charge of perjury, and a bond of indemnity against the note was held void. In *The Steuben County Bank v. Mathewson*, 5 Hill, 249, 251, the bond sued upon had been given upon an agreement that the bank should surrender up a note alleged to be forged, and should not make a criminal charge for forging the note or obtaining the money thereon. In *Porter v. Havens*, 37 Barb. 343, the notes in suit were executed by one Havens, against whom criminal proceedings were pending, and were placed in the hands of a third party to be delivered to Barron, the payee, when the criminal proceedings against Havens should be "discontinued and ended;" and upon the further condition that Barron, the payee, should not arrest Havens or cause him to be arrested on any process whatever, but should cease all proceedings against him. The plain intent of this agreement was to suppress the criminal prosecu-

tions. In *Conderman v. Hicks*, 3 Lans. 108, the note was given to obtain the release of the maker, and the termination of criminal proceedings for false pretences, pending against him, but without the approval of the court or magistrate, as provided in 2 Revised Statutes, page 730, section 66, etc.

But the present case exhibits no such elements; the agreement looked not to an abandonment of the prosecution, but to bringing the indictment to trial; not to the withholding of evidence, but to the procuring it; not to any secret effort to shield the plaintiff, but to an open application to receive him as State's evidence, with the consequences which usually follow.

A further ground for sustaining the validity of the agreement is to be found in the provisions of the Revised Statutes which permit the compounding, by leave of the court, of misdemeanors for which the injured party has a remedy by civil action. 2 R. S. 730, §§ 66, 67, 68. These provisions permit the court before whom the indictment is pending to exercise, in its discretion, the power of ordering a perpetual stay of the prosecution, on the injured party appearing and acknowledging satisfaction, and on the payment of costs. In the present case the charge was false pretences, by which the prosecutor had sustained pecuniary damages. This offence has been held to amount, not to a felony, but merely to a misdemeanor (*Fassett v. Smith*, 23 N. Y., 252), and therefore falls within the provisions of the statute. The prosecutor might, therefore, lawfully have agreed to appear before the court and invoke its action under the statute referred to. That course was not pursued, and therefore the statute cited has not, perhaps, a direct bearing upon this case, but it affords some indication of the policy of the law upon the subject under consideration.

The whole point of the case lies in this: An agreement to cripple, stifle, or embarrass a prosecution for a criminal offence, by destroying or withholding evidence, suppressing facts, or other acts of that character, is against public policy, and void. In such cases the parties take the responsibility of interfering with, and by secret or indirect means, frustrating the administration of justice. But an agreement to lay the whole facts before the court, and to leave it to the free exercise of the discretionary powers vested in it by law, is not in itself wrong, and is not rendered illegal even by a stipulation on the part of a prosecutor to exert such legitimate influence as his position gives him in favor of the extension of mercy to a guilty party.

Some other points have been suggested on the part of the defence which merit observation. The argument that the plaintiff's agreement to testify was not a sufficient consideration for the defendant's engagement has been already met. The plaintiff was privileged against criminating himself, and the waiver of this privilege constituted a consideration.

But it is further urged that any agreement to give testimony in consideration of a reward is against public policy, having a tendency to

induce the commission of the crime of perjury; and in a well considered case (*Pollak v. Gregory*, 9 Bosw. 116) it was held that an agreement to pay a witness for testifying, on condition that his evidence should lead to a result favorable to the party calling him, was illegal and void. But the evil of such an agreement consists in the condition, which holds out to the witness the temptation of falsifying his testimony, so as to produce the result upon which his compensation is to depend. (Where the witness simply consents to make a disclosure of the truth, and, as in the present case, he has no inducement to produce any special result, the mischief is not apparent.) In *Yeatman v. Dempsey*, 7 C. B. [N. S.] 628, an agreement to testify, divested of such a condition, was sustained; and also in *Webb v. Page*, 1 C. & K. 23, in the case of an expert.

The defendant deemed the testimony of the plaintiff essential to enable him to recover the judgment in question. It is conceded and found that the plaintiff performed his part of the agreement; and it is fairly presumable that the judgment was obtained by means of his testimony. It would be exceedingly unjust to enforce that judgment against him under the circumstances.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CHURCH, Ch. J., ALLEN, and FOLGER, JJ., concur.

GROVER, ANDREWS, and MILLER, JJ., dissent.

*Judgment reversed.*¹

(c) AGREEMENTS TO SUBMIT TO A SPECIFIED TRIBUNAL.

ALEXANDER SCOTT v. GEORGE AVERY.

IN THE HOUSE OF LORDS, JUNE 25, JULY 9, 1855, MAY 19,
JULY 10, 1856.

[Reported in 5 House of Lords Cases, 811.]

ACTION on three policies of insurance effected on the ship "Alexander," valued at £2400, in three assurance companies, of which both the plaintiff and defendant were members. It will be sufficient to refer to the first only. The declaration, after stating in the usual form the making of the policy, alleged that it was mutually agreed that all rules and regulations of the association should be binding on the assurers and assured, as if they were inserted in the policy and formed part thereof, and that the said rules and regulations, so far as they relate to the plaintiff's claim, are as follows: {That any member who shall prove to the committee of the said association that his ship is lost, will be entitled (at the expiration of two months from the date of the first

¹ *Rogers v. Hill*, 22 R. I. 496, acc.

quarterly settlement) to part payment for the same, but in no case to exceed £80 per cent on the sum insured, until a final account of the proceeds of the sale of the materials is furnished to the underwriters. That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. The declaration then alleged that the plaintiff "has performed all the conditions and things on his part by the said contract, policy, rules, and regulations to be performed; but that although he has always been ready and willing that such loss should be ascertained and settled by the said committee according to the rules of the said association of which the defendant had notice; and although the plaintiff has requested the defendant and the said committee so to ascertain the said loss, and although a reasonable time for them so to do elapsed before the commencement of this suit, yet the said committee has refused and neglected so to do; and although two months have expired since the date of the first quarterly settlement of the said association which occurred next after the said committee had notice of the said loss; and although a final account of the proceeds of the sale of the materials of the said ship was furnished to the underwriters of the said policy, in accordance with the said rules, long before the commencement of this suit; and although a reasonable time for the defendant and the said committee to pay the said loss elapsed before the commencement of this suit, yet neither the defendant nor the said committee has paid such loss, or any part thereof."

The defendant pleaded several pleas, but the only pleas material to the case of this policy are the fifth and sixth.

The fifth plea stated that one of the rules and regulations of the Newcastle A 1 Insurance Association is as follows: "25. (That the sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society.) And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, which

three arbitrators, or any two of them, shall decide upon the claims and matters in dispute, according to the rules and customs of the club, to be proved on oath by the secretary." "And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun *de novo*. (Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association), that no member who refuses to accept the amount of any loss as settled by the committee hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award.) And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.)

(The plea then stated that "the said committee, in pursuance of the said rule, proceeded to ascertain and settle the said loss, but before they had ascertained or settled it a difference and dispute arose, which has ever since existed between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the repairs done to the said ship, and as to the sum to be paid by the said association to the plaintiff in respect of such loss; by reason and means and in consequence of which difference and dispute the said loss never has been ascertained or settled by the said committee.") Averment of readiness and willingness by the committee to refer, and the refusal of the plaintiff so to do; "and the matters of the said difference and dispute have not nor has any of them been referred to arbitrators or decided, nor has the said loss been ascertained or settled by arbitrators, as by the said rule is in such case required."

The sixth plea stated "that the said committee did not refuse or neglect to ascertain the said loss as alleged, but, on the contrary, the defendant says that the committee did within a reasonable time in that behalf, and before the commencement of this action, ascertain and settle the sum to be paid by the said association to the plaintiff for the said loss, as the plaintiff well knew; but the plaintiff was dissatisfied with the settlement so made by the said committee, and declined to accept the sum at which they so ascertained and settled the said loss; and thereupon a difference and dispute arose, which has ever since existed between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the sum to be paid by the said association to the plaintiff in respect of such loss." (The plea then alleged that the rule set out in the fifth plea was binding on the plaintiff and defendant, and stated, as before, that the defendant and the committee were willing to refer, but this the plaintiff refused, etc.)

Certain procedure had been contracted for, pursuant to which action.

Demurrer and joinder. Upon the argument of the demurrers at the sittings after Hilary Term, 1853, the Court of Exchequer gave judgment for the plaintiff in error.

On error brought the Court of Exchequer Chamber reversed that judgment, and gave judgment for the defendant in error. This writ of error was thereupon brought.

The judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Cresswell, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, and Mr. Justice Crowder attended.

Mr. *Atherton* and Mr. *C. E. Pollock* for the plaintiff in error.

Mr. *Bramwell* and Mr. *Manisty*, for the defendant in error.

The following question was put to the judges: "Whether, looking at the record in this case the judgment ought to be given for the plaintiff in error or for the defendant in error."

The LORD CHANCELLOR, after stating the nature of the action and the pleadings, said: This question appears to me to be one merely of construction of the policy. For there is no doubt of the general principle which was argued at your Lordships' bar, that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago, — *Kill v. Hollister*, 1 Wils. p. 129. That was an action on a policy of insurance, in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided that there an action would lie, although there had been no reference to arbitration.

Then, after the lapse of about half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been decided which are not reported; but in the time of Lord Kenyon occurred the case which is considered the leading case upon this subject, the case of *Thompson v. Charnock*, 8 T. R. 139. This was an action upon a charter-party, in which there was a stipulation that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action which had been brought upon a breach of the covenant, with an averment that the defendant had been and always was ready to refer the matter to arbitration. (That was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts.)

Just about the same time occurred a case in the Court of Common Pleas, when that court was presided over by Lord Eldon, the case of *Tattersall v. Groote*, 2 B. & P. 131. That was an action by the administratrix of a deceased partner against a surviving partner, for not naming an arbitrator, pursuant to a covenant in the deed of partnership. To that action there was a demurrer, and the demurrer was

allowed. But that case, I think, can afford very little authority in the present action, or in actions similar to the present, because there the covenant was only that if any dispute arose between the partners, they would name an arbitrator. One of the partners died, and his administratrix brought an action, and Lord Eldon pointed out that the covenant did not apply to a case where one of the partners was dead, and an action was brought by his representatives. Therefore, in truth, that amounts to no decision whatever upon the general question.

There was then a case before Sir Lloyd Kenyon at the Rolls, of *Halfhide v. Fenning*, 2 Brown, C. C. 336, in which he held a different doctrine. That was a bill for an account of partnership transactions. The plea to that bill was, that the articles contained an agreement that any difference which should arise should be settled by arbitration; and the Master of the Rolls allowed that plea. But I think that case cannot be relied upon, because it has been universally treated as having proceeded upon an erroneous principle. There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. (Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals.) (But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that in such cases as that, the policy of the law is left untouched.)

And that, I take it, is what was alluded to by Lord Hardwicke, in the case of *Wellington v. Mackintosh*, 2 Atk. 569, which was this: The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. Lord Hardwicke overruled the plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the court. I take it that what Lord Hardwicke meant was, that the parties might have so framed the stipulations amongst themselves that no right of action or right of suit should arise until a reference had been previously made to arbitration. (I think it may be illustrated thus: If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has

not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting. And the question is here, what is the contract? Does any right of action exist until the amount of damage has been ascertained in the specified mode? I think clearly not. The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that "the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit."

That the meaning of the parties therefore was, that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant. What the court below had to do was to ascertain what the meaning of the parties was as deduced from the language they have used. It appears to me perfectly clear that the language used indicates this to have been their intention: that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say.

It was argued that here the arbitrators were to decide, not the mere amount, but other matters, as, for instance, what average was to be allowed, whether there had been a loss, and a variety of other matters which were ingeniously suggested at your Lordships' bar. In the first place, if that had been so, it would not necessarily change my view of the case. I am not at all clear that it is not so. I observe the learned judges differed about that. I do not think it necessary to go into that, because I am quite prepared to say that, in my view of the case, that makes no difference at all. If, in consideration of a sum of money paid to me by A. B., I agree with him that, in case J. S. should decide that A. B. had fulfilled certain conditions, and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action would exist until J. S. had made his award.

I do not go into the question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone

is to be ascertained, because, in my view of the case, the principle goes much further. It appears to me perfectly clear that until the award was made, no right of action accrued, and consequently the judgment of the court below, reversing the judgment of the Court of Exchequer, and allowing the plea, was a perfectly correct judgment.

Your Lordships have had the benefit of the attendance of the learned judges on the argument in this case. They have differed in their opinion upon it; there was a majority, but a bare majority, in favor of the view which I have taken of this case. Whichever way the preponderance of opinion among the learned judges may be, and however great it may be either way, of course the ultimate decision rests with your Lordships; but it is always satisfactory to know that the view taken by your Lordships is in concurrence with the opinion of the learned judges. Here it is in concurrence with the opinion of a majority, though but a slender majority. However, I entirely agree with the majority; and I therefore humbly move your Lordships that the judgment below be affirmed, and that judgment be given for the defendant in error, with costs.¹

¹ Justices COLERIDGE, CRESSWELL, WIGHTMAN, and CROWDER, in answer to the inquiry of the Lords, delivered opinions in favor of the defendant in error. Justice CROMPTON and BARONS ALDERSON and MARTIN delivered contrary opinions. LORD CAMPBELL delivered an opinion concurring with the LORD CHANCELLOR.

In *Viney v. Bignold*, 20 Q. B. D. 172, WILLS, J., said: "The principle on which cases such as the present ought to be decided is very clear, and it is this. The court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover." *Elliott v. Royal Ex. Ass.*, L. R. 2 Ex. 237; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Collins v. Locke*, 4 A. C. 674; *Babbage v. Coulburn*, 9 Q. B. D. 235; *Caledonian Ins. Co. v. Gilmour*, [1893] A. C. 85; *Trainor v. Phoenix Fire Ass. Co.*, 65 L. T. 825; *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q. B. 606; *Spurrier v. La Cloche*, [1902] A. C. 446 acc. Compare *Edwards v. Aberayron Ins. Soc.*, 1 Q. B. D. 563.

A test apparently intended to be similar to that adopted by the English Courts was adopted in the following cases: *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Crossley v. Conn. Ins. Co.*, 27 Fed. Rep. 30; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562; 67 Fed. Rep. 486; *Connecticut Ins. Co. v. Hamilton*, 59 Fed. Rep. 258; *Mutual Ins. Co. v. Alvord*, 61 Fed. Rep. 755; *Old Sancelito Co. v. Commercial Ass. Co.*, 66 Cal. 253; *Adams v. South British Ins. Co.*, 70 Cal. 198; *Carroll v. Girard Ins. Co.*, 72 Cal. 297; *Denver, &c. R. R. Co. v. Riley*, 7 Col. 494; *Denver, &c. Co. v. Stout*, 8 Col. 61; *Union Pacific Co. v. Anderson*, 11 Col. 293; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209; *Liverpool Ins. Co. v. Creighton*, 51 Ga. 95; *Southern Ins. Co. v. Turnley*, 100 Ga. 296; *Birmingham Ins. Co. v. Pulver*, 126 Ill. 329, 338; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613; *Read v. State Ins. Co.*, 103 Iowa, 307; *Dee v. Key City Ins. Co.*, 104 Iowa, 167; *Fisher v. Merchants' Ins. Co.*, 95 Me. 486; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Guthat v. Gow*, 95 Mich. 527; *Boots v. Steinberg*, 100 Mich. 134; *Weggner v. Greenstine*, 114 Mich. 310; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Mosness v. German American Ins. Co.*, 50 Minn. 341; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Wolff v. Liverpool Ins. Co.*, 50 N. J. L. 453; *Delaware & H. C. Co. v. Penn. Coal Co.*, 50 N. Y. 250; *Seward v. Rochester*, 109 N. Y. 169; *National Co. v.*

WILLIAM LIVINGSTON v. ANTONIO RALLI.

IN THE QUEEN'S BENCH, TRINITY TERM, 1855.

[Reported in 5 *Ellis & Blackburn*, 132.]

COUNT that, by a contract, plaintiff agreed to buy of defendant, and defendant to sell to plaintiff, a cargo of wheat, on certain terms mentioned in the contract, "and that, should any difference arise as to that contract, the same should be left to arbitration in London, in the usual manner; that is to say, the arbitration of two London corn factors, one to be chosen by plaintiff and the other by defendant, or an umpire to be chosen by such arbitrators in case of difference." Averment that the cargo of wheat arrived, and was accepted, and the price paid by plaintiff to defendant, according to the agreement, and that a difference thereupon and before this suit arose between plaintiff and defendant as to the said contract, which difference ought to have been left to arbitration in manner so agreed as aforesaid. General averment of performance by plaintiff, and of lapse of reasonable time for appointing an arbitrator. Breach: that defendant refused to concur with plaintiff in referring the said difference, or procuring it to be disposed of by arbitration in the said usual manner, and wrongfully hindered and prevented its being so left or disposed of.

Plea, setting out the contract in *hæc verba* as follows: "London, 21st January, 1854. Sold by order and on account of Messrs. A. Ralli & Co., to our principals the cargo of Taganrog Ghirka wheat shipped at Taganrog on board the Mary and Ellen, and consisting of 2630 chetwerts of 10 poods, as per bill of lading dated the 12th November, at the price of 75 s. say seventy-five shillings per quarter, free on board there, including freight and insurance (the latter free from war risk), to a safe port in the United Kingdom, calling for orders. Reckoning 72 quarters for every 108 chetwerts of 10 poods shipped. No charge to be made for demurrage. The sale subject to the arrival

Hudson River Co., 170 N. Y. 439; Keefe v. National Soc., 4 N. Y. App. Div. 392; Spink v. Co-operative Ins. Co., 25 N. Y. App. Div. 484; Van Note v. Cook, 55 N. Y. App. Div. 55; Pioneer Mfg. Co. v. Phoenix Ass. Co., 106 N. C. 28 (see, however, Pioneer Mfg. v. Phoenix Ass. Co., 110 N. C. 176; Uhrig v. Williamsburg Ins. Co., 116 N. C. 491); Monongahela Nav. Co. v. Fenlon, 4 W. & S. 205; Reynolds v. Caldwell, 51 Pa. 298; Gowen v. Pierson, 166 Pa. 258; Chandley v. Cambridge Springs, 200 Pa. 230, 232; Scottish Ins. Co. v. Clancy, 71 Tex. 5; American Ins. Co. v. Baas Bros., 90 Tex. 380, 382; Van Horne v. Watrous, 10 Wash. 525; Zindorf Co. v. Western Co., 27 Wash. 31 (*conf.* Winsor v. German Soc., 72 Pac. Rep. 66); Chapman v. Rockford Ins. Co., 89 Wis. 572. See also Randall v. Phoenix Ins. Co., 10 Mont. 362; Kahn v. Traders' Ins. Co., 4 Wyo. 419. In many of these cases, however, the court considered not only the question whether the provision for arbitration was expressed as a condition precedent or as a collateral promise, but also the question whether the agreement for arbitration related to the liability under the contract or to the amount of damages.

of the wheat in good order and condition at port of call; a slight dry warmth, so long as the wheat is not injured for miller's use, is not to be objected to. Should the cargo not arrive in good order and condition, with the above exception, it is either to be accepted or rejected within 24 hours of the receipt of the report and samples by us for the buyer. The cargo to be examined at Queenstown by Messrs. James Scott & Company, and at Falmouth by Messrs. Lashbrooke & Hunt. Should the cargo be accepted, the buyer is to take all risk from port of shipment. Payment to be made in cash, less discount for the unexpired term of three months from date of bill of lading, on landing same, together with approved policies of insurance. Should the cargo be rejected, the money to be returned with interest. Should any difference arise as to this contract, the same is to be left to arbitration in London in the usual manner." Averment: "That the said supposed difference in the declaration mentioned was a difference concerning a claim and demand made by plaintiff upon defendant for compensation for damages alleged to be payable by defendant to the plaintiff by reason of the said cargo of the said wheat being deficient, as amounting to a less quantity than the quantities of 2630 chetwerts of 10 poods, as per bill of lading in the said agreement mentioned, and was no other difference whatsoever." Whereupon the defendant refused and declined to concur in referring the said supposed difference to arbitration, as in the declaration is alleged.

Demurrer. Joinder.

Willes, in support of the demurrer.

Jos. Kay, *contra*.

LORD CAMPBELL, C. J.¹ I have a very great respect for the doubts of LORD ELDON; and he seems, in *Tattersall v. Groote*,² to doubt much whether such a contract as the present was not altogether nugatory; but I cannot bring myself to doubt that, on principle, an action lies on it. There is a sufficient consideration to support any promise; and there is an express promise to refer any disputes that may arise. Why should not such a promise be binding, and one for the breach of which an action would lie? Can it be said that such an agreement is void as being immoral, or as contrary to public policy? It seems to me, on the contrary, that it is a very judicious and proper arrangement, and that it would be a strange restriction on the liberty of the subject if parties could not make such an agreement if they please.

Then, as to the authorities. It certainly seems that, in *Tattersall v. Groote*,³ LORD ELDON expressed much doubt: but neither in that case nor in any other was there a decision that an action could not be maintained on such an agreement: and, ever since I have known Westminster Hall at least, the opinion of the profession has been that, though such a prospective agreement of reference could not bar an action in

¹ COLERIDGE and ERLE, JJ., delivered concurring opinions. CROMPTON, J., also concurred.

² 2 B. & P. 131.

the courts of law, yet an action was maintainable for the breach of it. There seems at one time to have prevailed in our courts a horror of a domestic forum which I can neither sympathize with nor account for: but the Legislature has recently, in The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy. For these reasons I entertain no doubt that the action lies.

Then it is shown that there was no real difference to refer? The count avers that there was. The plea admits that there was a difference, which it states, and which, it is contended, has been already decided. But I cannot say that this is not a fair subject of difference. I do not know what evidence may be brought before the arbitrator, or how he may decide. I think if there was no real dispute that would be a bar: but that should be so pleaded that the plaintiff might take issue upon it; and then a jury would decide if there was a real difference or not.¹

**AUGUSTINE K. WHITE v. MIDDLESEX RAILROAD
COMPANY.**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 7—
JUNE 21, 1883.**

[Reported in 135 *Massachusetts*, 216.]

CONTRACT, for money had and received, to recover \$65, deposited by the plaintiff with the defendant corporation under a written agreement providing, among other things, that the plaintiff, who was about to enter the defendant's employ as a conductor, should, upon entering such employ, deposit the sum of \$65, to be retained by the defendant, together with interest accrued thereon and all wages that might be due him, as security for the proper discharge of his duties, for the due accounting for and paying over to the defendant of all fares received, and for the due observance by him of all the rules and regulations of the defendant; that, in case of a breach by the plaintiff of any of said rules and regulations, the defendant might retain the whole of said deposit and any interest thereon, and the amount of wages that might be due him, as liquidated damages, for such breach; and that the defendant's president "shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole

¹ *Donegal v. Verner*, 6 Ir. Rep. C. L. 504; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385; *Hill v. More*, 40 Me. 515, 523, *acc.* See also *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, 181; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633; *Gray v. Wilson*, 4 Watts, 39, 41. But only nominal damages are recoverable. *Leake on Contracts* (4th ed.), 676; *Munson v. Straits of Dover S. S. Co.*, 99 Fed. Rep. 787, 102 Fed. Rep. (C. C. A.) 926.

or any part of said \$65 and interest, and all wages that may at any time be due him, as liquidated damages. And his certificate in writing that the same or any given part thereof, stated in such certificate, are to be so retained and forfeited to the company, and of the cause of such retention, shall be a final adjudication thereof, binding and conclusive evidence between the parties in all courts of justice, civil and criminal, both that the amount thereby certified as the true amount to be forfeited and retained has become and is so forfeited and retained by the company, and that that has happened which in such certificate is certified to be the cause, and that it is a lawful and sufficient cause for such retention; and such certificate shall bar the conductor of all right, under any circumstances, to recover the moneys so certified to be forfeited and retained, or any part thereof."

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts, in substance as follows:—

The defendant received said \$65 under said agreement, and the only claim the defendant has to such money is by virtue of the agreement and the president's certificate indorsed thereon, as follows: "By virtue of the written agreement, and under the power therein conferred upon me, I, Charles E. Powers, president of said Middlesex Railroad Company, do hereby adjudge and decide that said railroad company is entitled to retain the whole of the \$65 deposited with it under said agreement, together with all the interest thereon, and the same is hereby declared to be forfeited to the said railroad company on account of the breach by the within-named Augustine K. White, conductor, of the fourth clause of said agreement [which related to the faithful discharge of his duties as conductor] and of the sixty-fifth and sixty-sixth rules and regulations of the Middlesex Railroad Company."

The rules and regulations above referred to were as follows: "65. The punch must be used to cancel and record a fare for each and every person over three years of age who rides upon the car. 66. As soon as fare has been received from one person the punch must be used in the presence of such person, to record such fare or fares, before another one is taken up. Failure to comply with this rule, in every instance will be positive cause of dismissal."

The plaintiff contends that this money should be paid to him for the reason that the agreement was, on its face, unconscionable and void, and against public policy.

The defendant contends that the agreement was valid, legal, and final between the parties.

If the court should be of opinion that the agreement was void, judgment was to be entered for the plaintiff; if it was valid, judgment for the defendant.

L. M. Child, for the defendant.

J. F. Pickering and *J. W. Pickering*, for the plaintiff.

FIELD, J. If the parties had an opportunity to appear and be heard

before the president of the company, and the plaintiff had appeared and been heard, and an award had been actually made that nothing was due the plaintiff, this award would be a bar to the action, unless for some cause it was impeached. The fact that the arbitrator was an officer of the defendant corporation, as it was known to the plaintiff when he signed the agreement, would not invalidate the award. But it does not appear by the agreed statement of facts that any hearing was ever had before the president, or that the company ever made any claim before him that the plaintiff had not fully performed his duties, or that the plaintiff ever had any notice that the company made any such claim, and that the president would proceed to hear the parties, and adjudicate upon the question whether the company had the right under the agreement to retain the whole or any part of the \$65.

By the agreed facts it appears that the contention between the parties is not upon an award, but upon the agreement, whether it is valid or void; and that, if the court is of opinion that the agreement is void, judgment is to be entered for the plaintiff; if it is valid, judgment to be for the defendant. The principal contention in argument on the part of the company is, that this is not an agreement to arbitrate, but an agreement that the company may retain the whole of the \$65, or such part as the president may adjudge, and that, until the president has adjudged that the whole or some part is due to the plaintiff, no action at law can be maintained by him.

London Tramways Co. v. Bailey, 3 Q. B. D. 217, is almost identical with the case at bar, and the judgment was for the company. See also *Wilson v. Glasgow Tramway & Omnibus Co.*, 5 Sc. Sess. Cas. (4th ser.) 981, and *Glasgow Tramway & Omnibus Co. v. Dempsey*, 3 Coup. Just. 440. The decision in *London Tramways Co. v. Bailey*, *ubi supra*, was by Mellor and Lush, JJ., and is put upon the ground that the "agreement is very like the stipulation that the certificate of an architect or engineer shall be conclusive." It seems to be the doctrine of the English courts that agreements prohibiting a party from bringing an action or purporting to oust the courts entirely of their jurisdiction, are void; that, in contracts in which it is a condition precedent to the right to maintain an action that there shall first be a reference and an award, no action can be maintained until this condition has been complied with, unless, indeed, it becomes impossible to comply with it; but if the stipulation to refer to arbitration is collateral to the other stipulations of the contract, an action can be maintained upon the contract without a reference. *Babbage v. Coulburn*, 9 Q. B. D. 235; *Edwards v. Aberayron Ship Ins. Society*, 1 Q. B. D. 563; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Hope v. International Financial Society*, 4 Ch. D. 327; *Scott v. Liverpool*, 3 De G. & J. 334; *Horton v. Sayer*, 4 H. & N. 643.

Scott v. Avery, 5 H. L. Cas. 811, left it uncertain whether, if in a contract the agreement to submit to arbitration is a condition precedent to maintaining the action, and includes all disputes that may arise under

the contract, and is not confined to questions which affect the amount of damages, it is, or is not, void. The cases we have cited show that English judges do not yet agree in opinion on this question. The inclination of this court has been to regard such an agreement as void. *Cobb v. New England Ins. Co.*, 6 Gray, 192; *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Vass v. Wales*, 129 Mass. 38. See also *Trott v. City Ins. Co.*, 1 Cliff. 439; *Mansfield v. Doolin*, I. R. 4 C. L. 17.¹

If such an agreement in a contract is not void as contrary to the policy of the law, the whole doctrine amounts to this, that courts will not specifically enforce the agreement, but will treat it as valid, and as a condition precedent, or as an independent stipulation, according to the construction given to the contract.

The agreement in this case seems to us an attempt to oust courts entirely of jurisdiction over the question whether the defendant is entitled to retain the whole, or some part, of the \$65, as liquidated damages, for a breach of the contract. It regards this sum, or such part of it as the president may determine, as forfeited by the plaintiff, if the president shall so certify.

In *Hope v. International Financial Society*, *ubi supra*, the defendant contended that the plaintiff had no standing in court, because he had forfeited his shares under the articles of association by taking legal proceedings against the company; but Lord Justice James said: "We cannot listen to that argument. Any stipulation that a shareholder shall not appeal to a court of justice must be bad." 4 Ch. D. 334.

In *London Tramways Co. v. Bailey*, *ubi supra*, no cases were cited by the court, and only *Brown v. Overbury*, 11 Exch. 715, and *Scott v. Avery*, *ubi supra*, were cited by counsel. *Brown v. Overbury* was an action to recover the stakes at a steeple chase, when the stewards, who, by the articles, were to decide the race, had met, and were unable to decide whose horse had won; and it was held that it was a condition

¹ *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. Rep. 488; *Meaher v. Cox*, 37 Ala. 201; *Western Ass. Co. v. Hall*, 112 Ala. 318; *Bauer v. Samson Lodge*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133; *Louisville, &c. Ry. Co. v. Donnegan*, 111 Ind. 179; *Supreme Council v. Forsinger*, 125 Ind. 52; *McCoy v. Able*, 131 Ind. 417; *Isen v. Wright*, 55 S. W. Rep. (Ky.) 202; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Stephenson v. Piscataqua Ins. Co.*, 56 Me. 419; (but see *Fisher v. Merchants' Ins. Co.*, 95 Me. 486); *Phoenix Ins. Co. v. Zlotky*, 92 N. W. Rep. (Neb.) 736; *Hartford Ins. Co. v. Hon.* 92 N. W. Rep. (Neb.) 742; *Leach v. Republic Ins. Co.*, 58 N. H. 245; *Baltimore, &c. R. R. Co. v. Stankard*, 56 Ohio St. 224; *Myers v. Jenkins*, 63 Ohio St. 101; *Ball v. Doud*, 26 Oreg. 14; *Gray v. Wilson*, 4 Watts, 39; *Commercial Union Ass. Co. v. Hocking*, 115 Pa. 407; *Yost v. Dwelling House Ins. Co.*, 179 Pa. 381; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. 255; *Needy v. German American Ins. Co.*, 197 Pa. 460; *Pepin v. Société St. Jean Baptiste*, 23 R. I. 81; *Daniher v. Grand Lodge*, 10 Utah, 110; *Kinney v. Baltimore, &c. Association*, 35 W. Va. 385 (*conf. Baer's Sons Co. v. Cutting Fruit Packing Co.*, 43 W. Va. 359) *acc.* See also *Edwards v. Aberayron Ins. Co.*, 1 Q. B. D., 563, and the *Michigan*, *Minnesota*, and *New York* decisions cited in the note to *Scott v. Avery*, *ante*; also *Greenhood on Public Policy*, 467 *et seq.* and cases cited.

precedent to the plaintiff's right to recover that he obtain the judgment of the stewards, if practicable. Baron Alderson said: "Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of the jury, but of the persons appointed to decide it, viz., the judges or the stewards. The court do not decide what the effect would be if it became impossible to obtain a decision from the stewards. There is, we think, notwithstanding what was said by Lord Campbell in *Scott v. Avery*, *ubi supra*, little analogy between that case and the case at bar. Neither do we think that this agreement is like a building contract, in which the decision and certificate of an architect or engineer, upon the quantity or quality of the work done, is a condition precedent to the plaintiff's maintaining his action for the price. Such a stipulation in a building contract is not regarded as strictly an agreement to submit to arbitration. *Wardworth v. Smith*, L. R. 6 Q. B. 332; *Palmer v. Clark*, 106 Mass. 373. No hearing of the parties is usually contemplated. The matters to be examined relate to things that are visible and can be determined by appraisal, inspection, measurement, or other similar methods, and pertain solely to the performance of the work to recover the price of which the plaintiff brings his action, and it is an irrevocable part of such contracts that the plaintiff shall recover only upon the condition that the architect or engineer certifies that the work has been done according to the contract, or shall only recover for extra work whatever the architect or engineer estimates the value of it to be, or shall recover only if the work is done to the satisfaction of the architect or engineer.

This is not a suit for wages; and if it were, the plaintiff is not, by his agreement, required to perform his duties to the satisfaction of the president of the company, and there is no stipulation that the plaintiff shall recover as wages only such sum as the president may determine. This is a suit to recover a deposit. If the defendant claims the right to retain it, as liquidated damages, for a breach of the agreement by the plaintiff, the burden is on the defendant to prove the breach. If a controversy arises upon the questions whether there has been such a breach, and whether the company has the right to retain the deposit, as liquidated damages for such breach, there is a stipulation that the president shall be the sole judge of it, and that his certificate shall be a final adjudication of it. Such a stipulation is, we think, an agreement to submit to arbitration, and an attempt to oust courts of justice of all jurisdiction over the whole controversy, and is void.

In the opinion of a majority of the court, the

*Judgment must be affirmed.*¹

¹ *Rosen v. Dry Dock, &c. R. R. Co.*, 27 N. Y. Supp. 337, *contra*. See, however, *Pope Mfg. Co. v. Gormully*, 144 U. S. 224; *Fidelity Co. v. Eickhoff*, 63 Minn. 170; *Fidelity Co. v. Crays*, 76 Minn. 450; *Baltimore, &c. R. R. Co. v. Stankard*, 56 Ohio St. 224.

JONAS M. MILES AND ANOTHER v. ARTHUR P. SCHMIDT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, DECEMBER 3, 1896-
MAY 20, 1897.

[Reported in 168 Massachusetts, 339.]

BILL in equity, to enforce the specific performance of a written contract.

The defendant demurred to the bill, assigning as ground therefor the following arbitration clause contained in the contract:

"It is further mutually agreed that in case of any alleged violation of the promises and agreements herein made by said Schmidt or by said firm, if such alleged violation is continued after thirty days' notice in writing from the other to the party charged as guilty of such violation, requiring such party to cease such violation, then the party so guilty shall be liable to the other for all damages caused by such violation, to be determined by a board of referees in manner as follows:

"After the expiration of the thirty days' notice provided for in the above clause, said Schmidt and said firm shall each forthwith appoint a referee, and the two so appointed shall appoint the third. If either party fails to appoint a referee for ten days, after written notice of such appointment by the other party, then the referee so appointed shall appoint a second, and the two so appointed shall appoint a third.

"The referee shall proceed forthwith to hear the parties and to determine whether or not there has been any violation of the agreements herein contained, and whether the same has continued for more than thirty days after notice to discontinue such violation above provided for, and what damage either party has sustained by reason of such violation.

"The decision of a majority of said referees shall be final and binding on said parties, and they hereby agree to abide by, submit to, and forthwith to comply with any decision, or award, of a majority of said referees. The expense of any such reference shall be borne by any or all the parties in such proportion as said referees may determine."

The Superior Court sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

C. B. Southard (*T. Parker* with him), for the plaintiff.

H. M. Rogers, for the defendant.

MORRIS, J. Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law is settled otherwise in this State. *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Vass v.*

decided upon the obligation, not a condition precedent.

Wales, 129 Mass. 38; White v. Middlesex Railroad, 135 Mass. 216. When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld. Wood v. Humphrey, 114 Mass. 185; Reed v. Washington Ins. Co., 138 Mass. 572, 575; Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143. The defendant contends that the agreement for arbitration in this case goes no further than the assessment of damages. But it is expressly provided, amongst other things, that the referees shall "hear the parties and determine whether or not there has been any violation of the agreements herein contained, . . . and what damage either party has sustained" thereby, and that, "the decision of a majority of said referees shall be final and binding on said parties." ⁽¹⁾ The evident intent is to submit all disputes relating to the performance of the agreement to the final decision of a tribunal constituted by the parties themselves. The referees are not only to assess the damages, but also are to determine whether there have been any violations of the agreement, and their decision in all matters is to be final. The agreement to submit to arbitration was therefore in violation of law, and the demurrer should have been overruled.

*Demurrer overruled, and decree dismissing bill set aside.*¹

¹ In Reed v. Washington Ins. Co., 138 Mass. 572, the action was brought upon an insurance policy in the form prescribed by the Massachusetts statute. The policy contained the following provision: "In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, provided that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties."

At the conclusion of the plaintiff's evidence, the judge declined to rule, as requested by the defendant, that the plaintiff could not recover without evidence of a reference to arbitration. This ruling was sustained by the full court on the ground that the clause was not expressed as a condition precedent. See also Clement v. British American Ass. Co., 141 Mass. 298.

In Lamson Store Service Co. v. Prudential Ins. Co., 171 Mass. 433, the action was brought upon a policy in the form prescribed by a later Massachusetts statute (St. 1887, c. 214, § 60). The policy contained a clause similar to that quoted above, except for the following added words, "and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss." The court held that the words constituted a condition precedent to the plaintiff's right of action.

ECKERSLEY AND OTHERS v. THE MERSEY DOCKS AND HARBOUR BOARD.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, MARCH 16, 1894.

[Reported in [1894] 2 *Queen's Bench*, 667.]

APPEAL from the decision of the Queen's Bench Division, staying the proceedings in an action.

The plaintiffs, a firm of contractors, entered into a contract with the defendants, the Mersey Docks and Harbour Board, to execute for them works of excavation on a piece of their land for the purpose of making a new dock.

By clause 53 of the contract, "all disputes and differences of every kind which may arise between the contractors and the board during the progress or after the completion of the works contracted for, in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or the contract, or in relation to any of the works, or the payment to be made for the same, or as to the accounts between the board and the contractors, shall be and the same are hereby referred to the engineer of the board as sole arbitrator, with power to make awards from time to time as he may think proper, and with power to make such orders in any such award as to the costs and charges of and attending any such reference, and of the award, as the said engineer shall, in his discretion, think proper, and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made, and shall not be disputed on any ground whatever."

During the progress of the works contracted to be done by the plaintiffs, the defendants commenced to execute other works in a dock called the "Canada Dock," which adjoined the piece of land upon which the works contracted to be done by the plaintiffs were being carried on. The works in the Canada Dock were executed under the superintendence of the engineer's son, who was acting as assistant engineer to his father, and owing, as the plaintiffs alleged, to his negligence or incompetence, water escaped from the Canada Dock, and flooded the works which the plaintiffs were executing under the contract. The plaintiffs brought their action against the defendants, claiming, in substance, damages by reason of having been delayed and impeded, through the negligent acts of the defendants in the Canada Dock, in the execution of the works under the contract. An application was thereupon made on behalf of the defendants for a stay of proceedings, on the ground that the disputes between the parties were disputes which they had agreed, by clause 53 of the contract, to refer to arbitration.¹

A judge in chambers having ordered a stay of proceedings in the

¹ The statement of the case has been shortened.

action, the Queen's Bench Division (MATHEW and CAVE, JJ.), affirmed his order.

The plaintiffs appealed.

Moulton, Q. C., and *J. A. Hamilton*, for the appellants.

Sir R. Webster, Q. C. (Bigham, Q. C., Carver, and Llewellyn Davies, with him), for the respondents.

LORD ESHER, M. R.¹ In this case it is said on behalf of the plaintiffs that there is sufficient reason for the Court to say that the disputes in the action should not be referred to the engineer of the board, because he might be biassed. It is not a sufficient reason to say that he might be biassed, if the Court should be of opinion that there is no ground for supposing that he would be biassed. When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but to all judges — that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not act as judges in a matter where the circumstances are such that people — not necessarily reasonable people, but many people — would suspect them of being biassed. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his principal, both parties agree that the chief servant of one of them shall be the arbitrator? If it was not for the agreement of the parties — if the rule applicable to judges were to be applied — it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of being biassed in favor of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shown. It must, in my opinion, be shown, if not that he would be biassed, that at least there is a probability that he would be biassed. That seems to me distinctly to have been decided in *Jackson v. Barry Ry. Co.*² The case relied on by the plaintiffs is *Nuttall v. Mayor of Manchester*.³ That decision has been discussed, and, as I understand, it may be explained on the grounds that there was an unseemly personal dispute, raising a vindictive feeling between the engineer and contractor, and also that the engineer had expressed an opinion on the matter he had to decide so strongly as to amount to a prejudgment. If those were the grounds of the decision, the case is to be supported entirely; but it is not in point in the case before us, because the facts are quite different. If, however, the case decides, that the mere fact that the arbitrator will

¹ LORRE, L. J., and DAVEY, L. J., delivered concurring opinions.

² [1893] 1 Ch. 238.

³ 8 Times L. R. 513.

have to decide upon his own conduct is sufficient of itself to satisfy the Court that there is a good reason why the matter should not be referred to him, I think we ought not to agree with it. The decision, if that be the effect of it, seems to me absolutely contrary to *Jackson v. Barry Ry. Co.*,¹ and other cases, and he ought to overrule it. It must, therefore, be shown in the present case that it is, at least, probable that the engineer would be biassed. Now, what is relied on by the plaintiffs in order to show that? It seems to be admitted that, if the engineer had to consider whether he had himself given a negligent or unskilful or incompetent order, it could not be said that the Court would be justified in directing that the matter should not be referred to him; but the Court is asked to say that he should not be the arbitrator because the negligent, unskilful, or incompetent order was given by his son. That involves our saying that a man who, it is certain, would not be biassed in judging of his own acts, would probably be biassed to give a decision in favor of his son which he knew to be wrong. I cannot take that view of human nature. Where you have a man of high character, one whose character for impartiality cannot be impeached when he has to decide as to his own conduct, to say that such a man would not have enough honesty and strength of mind to act impartially where his son's conduct came in question is a statement which I cannot accept. I do not believe it in this particular case. I am of opinion that this appeal should be dismissed.²

AUBREY MITTENTHAL AND ANOTHER v. PIETRO
MASCAGNI.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 14-
FEBRUARY 26, 1903.

[Reported in 183 *Massachusetts*, 19.]

KNOWLTON, C. J. This case comes before us on a report from the Superior Court submitting the question whether there was an error of the presiding judge in overruling the motion to dismiss, the answer in abatement, and demurrer filed by the defendant, and in ruling that the fifteenth paragraph of the contract between the plaintiffs and defendant, upon certain facts agreed, was not a bar to the prosecution of the action in this Commonwealth. The contract referred to was made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the State of New York, elected a domicile by a provision of the contract. By it the defendant undertook to direct certain concerts, and direct and present certain operas, all composed by him, in the course of a tour through such parts of the United States and Canada as the plaintiffs should designate, covering a period of fifteen weeks, for the sum of \$4,000

¹ [1893] 1 Ch. 238.

² See also *New England Trust Co. v. Abbott*, 162 Mass. 148.

per week, with sundry provisions for expenses and the like, and other stipulations prescribing the rights of the parties in various particulars which it is unnecessary to state. The contract was in the Italian language, and, according to the translated copy set forth in the pleadings, it contains the following provisions: "The present contract, in its form and substance, is regulated by the Italian laws, by will of the parties concerned and according to article nine of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right of direct action in New York for the payment of his recompense; and therefore, he alone has the faculty to derogate the competence of the established contract." The defendant moved to dismiss this suit, and answered in abatement and demurred on the ground that, under this provision, our courts have no jurisdiction.

The construction and legal effect of a contract is governed by the *lex loci contractus* unless there is something in it indicating a different intention of the parties. *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356; *Brockway v. American Express Co.*, 168 Mass. 257; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *In re Missouri Steamship Co.*, 42 Ch. D. 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. This contract was made in Italy where one of the parties had his permanent home and the other a domicile elected by the terms of the contract. It was to be performed in part there, for the plaintiffs were to pay the defendant \$7,000 ten days before the time fixed for his departure from Cherbourg for the United States, but the further performance was to be in the United States. The intention of the parties that it should be governed by Italian laws was not left to inference, but was expressed in words.

The first and principal question is, What is the effect of the stipulation in regard to the adjustment of differences or questions between the parties? We have little doubt that it was meant to give exclusive jurisdiction of all such matters to the Italian courts, saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the courts of New York. This seems to be the meaning of the words of this translation, and another translation set out in the answer in abatement, whose correctness has not been disputed, tends to make this meaning even clearer. It is averred in the answer in abatement that such a provision is legal and binding under the laws of Italy. Of course, if this be true, it is immaterial what construction is put upon it under our laws. There is certainly nothing so objectionable in it, on grounds of public policy, that our courts will refuse to give it effect under our treaty with Italy, which gives the citizens of each country full rights in the courts of the other. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553. It is said in the report that the hearing was upon the pleadings "without objection that there was no reply to the answer in abatement." We are not quite certain whether, in

the absence of a reply, the averments of this answer were taken to be true. If they are true, it is the duty of our courts to give the contract effect according to the law of Italy; but we infer, in the absence of proof in support of the averments of the answer, that the case was considered upon the declaration and admitted facts only. Assuming this, we must also assume that the law of Italy is like our own (*Harvey v. Merrill*, 150 Mass. 1), and we come to the question whether such an agreement of parties to a contract is valid here.

It is decided that an agreement in a contract that the parties shall not avail themselves of their right to an appeal to the courts for the settlement of their controversies, but shall submit them to private arbitration, will not be enforced because it is such an utter abnegation of one's legal rights as should not be permitted. *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Miles v. Schmidt*, 168 Mass. 339. On the other hand it is allowable for parties to make such agreements in reference to preliminary and incidental matters of dispute, so long as they retain the right to appeal to the courts for the determination of any substantive question of liability. *Hood v. Hartshorn*, 100 Mass. 117; *Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *Hutchinson v. Liverpool & London & Globe Ins. Co.*, 153 Mass. 143. Perhaps the tendency in modern times is to permit greater freedom in contracting in matters of this kind than formerly. *Miles v. Schmidt*, 168 Mass. 339; *Daley v. People's Building, Loan & Saving Association*, 178 Mass. 13. In most cases, certainly in a case like the present, there is no occasion for the protection of the dignity or convenience of the courts. The contract was between citizens of foreign States who, so far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of their disputes.

The determining question seems to be whether such a contract as this is so improvident and unreasonable, such an abnegation of legal rights, that the government, for the protection of mankind, will refuse to recognize it, even when made in a foreign country by subjects or citizens of that country. We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances through a great many independent States, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the State may be arrested and held to bail or in imprisonment, if suits may be brought in any one of these numerous jurisdictions, there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent home in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the

breach grounded by place where it occurs.

courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from home of either." If, moved by such considerations, the parties made the agreement in question, shall the Court say that they were *non compotes mentis*, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand? The case is quite unlike *Nute v. Hamilton Ins. Co.*, 6 Gray, 174, although it has some features in common with that. In that case the provision was contained in a by-law of a mutual insurance company, and it undertook to limit claimants to one county in a small State for the venue of actions. The principles laid down in *Daley v. People's Building, Loan & Saving Association*, 178 Mass. 13, are applicable, although the cases are different in some particulars. Similar doctrines are stated in *In re New York, Lackawanna & Western Railroad*, 98 N. Y. 447, 452, and *Greve v. Ætna Live Stock Ins. Co.*, 81 Hun, 28.

There is no attempt here to deprive either party of the right of appeal to the courts, as in *Rowe v. Williams*, 97 Mass. 163, but only an attempt to narrow the area within which suits may be brought. This is analogous to the limitation of the subjects of which the courts shall have exclusive jurisdiction, by a provision for the arbitration of incidental and subsidiary questions out of court, which is approved in cases above cited. It is also analogous to the limitation by contract of the time within which suits may be brought. *Eliot National Bank v. Beal*, 141 Mass. 566. We are of opinion that this part of the contract is valid.

The defendant has done nothing that deprives him of his right to rely on the contract. The suit which he brought prior to this was upon a later contract, and against parties not identical. Besides, in his declaration in that case, in stating inducements, he took pains to aver that there was no right to sue upon this contract in this country. The second suit, which he brought after he had been held to answer in this, contains a similar averment, and apparently he brought it to avail himself of such rights as he might have in case the decision in the present suit should be adverse to him. We are of opinion that the ruling was erroneous.¹

Motion granted.

¹ Compare *Insurance Co. v. Morse*, 20 Wall. 445; *Boynton v. Middlesex Ins. Co.*, 4 Met. 212; *Nute v. Hamilton Ins. Co.*, 6 Gray, 174; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *Dahmé v. La Cour Suprême*, Rap. Jud. Queb. 21 C. S. 439.

A stipulation in a policy on which one hundred underwriters were severally liable that the assured should not sue more than one at one time, and that the decision in such an action should be decisive as to the liability of all, is valid, and a plea is good which sets forth that an action is brought in violation of the agreement. *New Jersey Works v. Ackerman*, 39 N. Y. Supp. 585.

SECTION IV.

Contracts tending to Corruption.

TRIST v. CHILD.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1874.

[Reported in 21 Wallace, 441.]

APPEAL from the Supreme Court of the District of Columbia; the case being thus:—

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadalupe Hidalgo,—a claim which the government had not recognized,—resolved, in 1866–67, to submit it to Congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before Congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent of whatever sum Congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to Congress. Before final action was taken upon it by that body Child died. (His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim) (By an act of the 20th of April, 1871, Congress appropriated the sum of \$14,559 to pay it.) (The son thereupon applied to Trist for payment of the 25 per cent, stipulated for in the agreement between Trist and his father. Trist declined to pay.) (Hereupon Child applied to the Treasury Department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.)

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the \$14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant \$5,000, and for general relief.

The defendant answered the bill, asserting, with other defences going to the merits, that all the services as set forth in their bill were “of such a nature as to give no cause of action in any court either of common law or equity.”

—The case was heard upon the pleadings and much evidence. A part

of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see various members of Congress, soliciting their influence in behalf of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case:—

FROM CHILD, JR., TO TRIST.

HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., Feb. 20, 1871.

MR. TRIST: Everything looks very favorable. I found that my father has spoken to C— and B—, and other members of the House. Mr. B— says he will try hard to get it before the House. He has two more chances, or rather “morning hours,” before Congress adjourns. A— will go in for it. D— promises to go for it. I have sent your letter and report to Mr. W—, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most labor is indifference.

Yours, &c.,

L. M. CHILD.

The court below decreed—

1st. That Trist should pay to the complainant \$3,689, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury “any of the moneys appropriated to him” by the above act of Congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Messrs. Durant and Horner, for the appellants.

Messrs. B. F. Butler and R. D. Mussey, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury “any of the money appropriated to him” by Congress, until he should have paid the demand of the appellee.

(This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly.) Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant

upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. (A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee.) (But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.)

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in no wise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury.

If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case. Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. (Lord Mansfield said: "Many contracts which are not against morality are still void as being against the maxims of sound policy.")

It is a rule of the common law of universal application, that where a contract expressed or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:—

An agreement to pay for supporting for election a candidate for sheriff; to pay for resigning a public position to make room for another; to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself; to pay for procuring a contract from the government; to pay for procuring signatures to a petition to the governor for a pardon; to sell land to a particular person when the surrogate's order to sell should have been obtained; to pay for suppressing evidence and compounding a felony; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution; to pay for promoting a marriage; to influence the disposition of property by will in a particular way.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional.¹ But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practised by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall.

¹ *Salinas v. Stillman*, 66 Fed. Rep. (C. C. A.) 677; *Bergen v. Frisbie*, 125 Cal. 168; *Barry v. Capen*, 151 Mass. 99; *Chesebrough v. Conover*, 140 N. Y. 382; *Yates v. Robertson*, 80 Va. 475; *Houlton v. Nichol*, 93 Wis. 393, *acc.* See also *Davis v. Commonwealth*, 164 Mass. 241.

Sec. 1728-1729 Delly.

Such is the voice of universal history. The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. (If he uses nefarious means with success, the spring-head and the stream of legislation are polluted.) To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step.

He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to

*Dismiss the bill.*¹

¹ *Providence Tool Co. v. Norris*, 2 Wall. 45; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Findlay v. Pertz*, 66 Fed. Rep. (C. C. A.) 427; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. (C. C. A.) 4; *Hunt v. Test*, 8 Ala. 713; *Weed v. Black*, 2 McArthur (D. C.), 268; *Doane v. Chicago City R. R. Co.*, 160 Ill. 22; *Bermudez Co. v. Crichfield*, 62 Ill. App. 221, 174 Ill. 466; *Elkhart County Lodge v. Crary*, 98 Ind. 238; *Kansas, &c. Ry. Co. v. McCoy*, 8 Kan. 543; *McBratney v. Chandler*, 22 Kan. 692; *Deering v. Cunningham*, 63 Kan. 174; *Wood v. McCann*, 6 Dana, 366; *Wildly v. Collier*, 7 Md. 273; *Houlton v. Dunn*, 60 Minn. 26; *Richardson v. Scott's Bluff County*, 59 Neb. 400; *Lyon v. Mitchell*, 36 N. Y. 235; *Mills v. Mills*, 40 N. Y. 546; *Veasey v. Allen*, 173 N. Y. 359; *Winpenny v. French*, 18 Ohio St. 469; *Sweeney v. McLeod*, 15 Oreg. 330; *Clippinger v. Kepbaugh*, 5 W. & S. 315; *Spalding v. Ewing*, 149 Pa. 375; *Powers v. Skinner*, 34 Vt. 274; *Bryan v. Reynolds*, 5 Wis. 200; *Chippewa Valley Co. v. Chicago, &c. Co.*, 75 Wis. 224; *Houlton v. Nichol*, 93 Wis. 393, acc. See also *Washington Irrigation Co. v. Krutz*, 119 Fed. Rep. (C. C. A.)

MEGUIRE v. CORWINE.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1879.

[Reported in 101 *United States*, 108.]

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. *Frederick P. Stanton*, for the plaintiff in error.Mr. *Enoch Totten*, for the defendant in error.

Mr. JUSTICE SWAYNE delivered the opinion of the court: —

The plaintiff in the court below is the plaintiff in error here.

The first count of the declaration avers that in consideration of the assistance to be rendered by him to the defendants' testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "Farragut prize cases," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defence in those cases, — which assistance was accordingly rendered, — the testator promised the plaintiff to pay him one half of all fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases \$29,950, of which sum the plaintiff was entitled to be paid one half, &c.

The second count is substantially the same with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defence of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government.

279; *Brown v. First Nat. Bank*, 137 Ind. 655; *Thompson v. Wharton*, 7 Bush, 563; *Buck v. First Nat. Bank*, 27 Mich. 293; *McDonald v. Buckstaff*, 56 Neb. 88.

In *Southard v. Boyd*, 51 N. Y. 177, the defendant, a ship-owner, residing in Boston, hearing of the Banks expedition, came to New York, seeking employment in this expedition for one of his ships known as the "Red Gauntlet." Failing to charter it himself, he called at the office of the plaintiffs and left his ship for charter, limiting them, however, to a charter for *troops*, and returned to Boston. At this interview he was informed that the commissions, in case of charter, would be five per cent. In its opinion the court say: "The further claim is made that the contract with the plaintiff was for an illegal service, in that they charged a commission for claiming to have influence with a government agent to accept a vessel already offered, but not yet accepted. It is true that one of the plaintiffs was a son, and that another was a son-in-law of one of the government agents, whose business it was to select the vessels for the government, and the plaintiffs probably had facilities for chartering vessels which others did not have. But the plaintiffs did not contract to do an illegal service. They did not agree to use any corrupt means to procure the charter. The fact that the plaintiffs had intimate relations with the government agents, and could probably therefore influence their action much more readily than others, did not forbid their employment. *Lyon v. Mitchell*, 36 N. Y. 235."

The third is a common count alleging the indebtedness of the testator to the defendant for work and labor to the amount of \$12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover. Lovel testified that "the testator also stated that he had agreed to pay the plaintiff one-half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defence in said cases."

"On cross-examination, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the treasury Department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that, in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one half of the fees which he (Corwine) might receive from the United States for services in said cases.

"The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit — he thought some time last year — he met the testator (R. M. Corwine, deceased) in the Treasury department, and had a conversation with him about the plaintiff and the Farragut cases. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one half of his fees in the Farragut cases, and had paid him one half the retainer received in 1869, and \$4,000 in July, 1873, and had taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defence in the Farragut cases, and that he had agreed to pay to the plaintiff one half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of the Secretary of the Treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, Chief Quartermaster of the Department of the Gulf, during the war, and had possession of Holabird's papers, from which he derived the facts communicated to

the testator for the defence of government in the prize suits in question. It was not controverted that the amount of fees received by the testator was \$25,950, and that he paid over to the plaintiff \$4,475 before the breach occurred between them. The further sum of \$8,500 was claimed by the plaintiff, and this suit was brought to recover it. The learned counsel for plaintiff in error complains in his brief that "in the charge of the court, page 10, the jury were instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and a distinct contract;' and in the first instruction asked by the defendants and given by the court the jury were told 'that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.' . . . There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury were not allowed to infer, as they well might have done from the testimony of more than one of the witnesses, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business."

In our view of the record this is the turning-point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we have been unable to find any. [The instructions expressly saved the right of the jury to find another and a different contract, and their attention was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnesses called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.]

A judge has no right to submit a question where the state of the evidence forbids it. *Michigan Bank v. Eldred*, 9 Wall. 544. [On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly.] *Merchants' Bank v. State Bank*, 10 id. 604. The practice condemned in *Michigan Bank v. Eldred* is fraught with evil. It tends to create doubts which otherwise might

not, and ought not to exist, and may confuse the minds of the jury and lead them to wrong conclusions. If the instructions here under consideration are liable to any criticism, it is that they were more favorable to the plaintiff in error than he had a right to claim.

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314; *Tool Company v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 id. 441; *Coppell v. Hall*, 7 id. 542. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In *Trist v. Child* (*supra*), while recognizing the validity of an honest claim for services honestly rendered, this court said: "But they are blended and confused with those which are forbidden; the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases potior conditio defendentis. Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. *Barth v. Clise, Sheriff*, 12 Wall. 400. *Judgment affirmed*.¹

¹ See also *Schloss v. Hewlett*, 81 Ala. 266; *Edwards v. Randle*, 63 Ark. 216; *Martin v. Wade*, 37 Cal. 168; *Conner v. Canter*, 15 Ind. App. 690; *Glover v. Taylor*, 38 La. Ann. 634; *Harris v. Chamberlain*, 126 Mich. 280; *Dickson v. Kittson*, 75 Minn. 168; *Gray v. Hook*, 4 N. Y. 449; *Basket v. Moss*, 115 N. C. 448; *Hunter v. Nolf*, 71 Pa. 282; *Whitman v. Ewin*, 39 S. W. Rep. (Tenn. Ch.) 742; *Willis v. Compress Co.*, 66 S. W. Rep. (Tex. Civ. App.) 472; *Meacham v. Dow*, 32 Vt. 71.

WOODSTOCK IRON COMPANY v. RICHMOND AND
DANVILLE EXTENSION COMPANY.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1888.

[Reported in 129 United States, 643.]

MR. JUSTICE FIELD delivered the opinion of the court: —

As appears from the pleadings, some time previous to November, 1881, the plaintiff below, the Richmond and Danville Extension Company, a corporation created under the laws of New Jersey, entered into a contract with the Georgia Pacific Railway Company, a corporation created under the laws of Georgia, to locate and construct for the latter company, by the nearest, cheapest, and most suitable route, a railroad from Atlanta in Georgia through Alabama to Columbus in Mississippi, at the rate of \$20,000 a mile, to be paid in whole or part in the bonds of the railroad company; and in November, 1881, it was engaged in locating and constructing the road under the contract. At that time the defendant below, the Woodstock Iron Company, a corporation created under the laws of Alabama for the manufacture and sale of products of iron ore, was doing business at the town of Anniston in that State; and it then made a formal proposition in writing to the Extension Company that if it would locate and construct, or cause to be located and constructed, the railroad by way of the town of Anniston, then the Iron Company would donate and convey, or cause to be donated and conveyed, to the Extension Company sundry parcels of land both within and without the corporate limits of the town, for the location of the road, and which might be necessary for sidings or spare tracks; and would also donate and pay to the Extension Company \$30,000, one half when the road made a connection with the line of the Alabama Great Southern Railroad Company at Birmingham, Alabama, and the other half when the road made a connection with the line of the Louisville and Nashville Railroad Company at that place; the payments to be made provided the road should be so far completed as to make the connections designated within three years. The proposition was formally accepted in writing by the Extension Company, through its vice-president John W. Johnston.

Pursuant to this contract the Extension Company located and constructed the railroad by way of the town of Anniston by the first of January, 1883, and made the connections specified, within the period designated, and complied in every respect with its terms.

The Woodstock Iron Company complied with the contract only in part. At the request of the Extension Company it conveyed to the railroad company the several parcels of land mentioned, and also upon like request furnished it with cars to the value of \$6,325. For the

balance, amounting to \$23,675, the present suit was brought, and the principal question presented to the court below, and to this court, is whether the contract is obligatory upon the defendant, or whether it is void as being against public policy.

In determining this question, it must be borne in mind that the contract of the Extension Company with the Georgia Pacific Railway Company was to locate and construct the road "by the nearest, cheapest, and most suitable route from Atlanta, Georgia, through Alabama to Columbus in Mississippi," for the consideration of \$20,000 a mile, and that it is averred in the pleadings and admitted by the demurrer, that in causing the road to be located by way of Anniston, it was necessary to deflect the same from the nearest and cheapest and most natural route between the designated termini, a distance of five miles, at an additional cost of \$100,000. In the light of these facts there can be but one answer given to the question presented respecting the contract between the Iron Company and the Extension Company, namely, that it was a void contract, immoral in its conception and corrupting in its tendency. It was a contract by an employé of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer. The proposition of the Iron Company, which was accepted, was to pay the Extension Company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction on the part of the Iron Company was none the less offensive because of the threats of the Extension Company, made by its vice-president, who was also a director and stockholder of the railroad company, that if the land and money mentioned were not donated, it would cause the road to be located away from Anniston by the rival town of Oxford. The threats did not excuse, much less justify, the offer.

We have thus far considered the case as one only between private parties where an employé has agreed, for a money consideration, to violate his obligation to his employer; but there are other circumstances which add to the offensiveness of the transaction. The business of the Extension Company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction are private corporations, but whilst their directors are required to look to

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the interests of their stockholders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrangements, therefore, by which directors or stockholders or other persons may acquire gain, by inducing those corporations to disregard their duties to the public are illegal and lead to unfair dealing, and thus being against public policy will not be enforced by the courts. In this case the Extension Company, to which the duty of locating and constructing the railroad between its termini was entrusted, in agreeing, for a consideration offered by a third party, to disregard that duty and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public.

The case of *Fuller v. Dame*, 18 Pick. 472, 483, is instructive on this head. It there appeared that Dame, the defendant, was the owner of a large tract of land and flats situated on Sea Street, and between it and Front Street, on the south side of Boston, which would be greatly enhanced in value if the Boston and Worcester Railroad Company would locate one of its depots between those streets and easterly of Front Street. To induce the company to make such location it was supposed to be necessary to form an association, which would pay to it a large sum of money and furnish a large tract of land for the depot, besides making other donations; and to provide the money and land, also to form a company to purchase the flats and land between the streets named, to be held as joint stock and laid out in due form and shape for sale. Fuller agreed to aid Dame in getting up such company, and in inducing the railroad company to fix its termination and principal depot between those streets, Fuller being himself of opinion that the railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the southerly side and have its principal depot there. In consideration of such agreement Dame gave his note for \$9600, payable to Fuller in three years, the note being deposited with third parties, to be delivered to him when the principal depot of the railroad company for merchandise was constructed between the streets mentioned. Fuller was at the time of the agreement a stockholder in the railroad company. The road having been completed, and the principal depot located between the streets mentioned, and the note not being paid, suit was brought upon it. It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void. In coming to this conclusion the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences, by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest

in establishing the fittest and most suitable location for the termination of the Boston and Worcester Railroad for the accommodation of the public travel. It is true the road was constructed and located by the corporation at the expense of private parties under the sanction of the legislature, incorporated for that purpose, who were to be remunerated by a toll levied and regulated by law; and it was left to its directors to fix the termination and place of deposit. But the court added: "In doing this a confidence was reposed in them, acting as agents for the public, — a confidence which, it seems, could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried, and had goods to be carried, that is, with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness, without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests, to be affected and controlled by considerations having no regard to such interests. It is no answer to say that, by the act of incorporation, the executive authority was vested in a board of directors, and Mr. Fuller was not a director. He was a member of the company, and might be chosen a director. He was an elector of the directors, and they were directly responsible to the stockholders. The immediate act of location was with directors, but the efficient authority was with the members and stockholders of the corporation, who elect the directors. The election may depend upon the known views and opinions of candidates upon this very question of location. They had a right to his disinterested judgment and advice upon the question of location; and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended upon this decision of the question by the directors."

The case before us is much stronger than the one thus decided by the Supreme Judicial Court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its depots at a particular place in the city. Here the contract was with an employé of the company to induce it to disregard its obligations; and the principal person making that contract on the part of the employé was a director and stockholder of the company which was to be thus seriously affected.

The principle, which is so clearly and forcibly stated in *Fuller v. Dame*, has been applied in numerous instances by the highest courts of different States, to avoid contracts made to influence railroad companies

in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. Thus in *Bestor v. Wathen*, 60 Illinois, 138, it appeared that in 1849 the legislature of Illinois incorporated a company to build a railroad from a point on the Mississippi River to Peoria, and that in 1852 the charter was amended so as to authorize the extension of the road from Peoria eastward to the State line. In 1855 the company made a contract with the firm of Cruger, Secor, & Company, by which the latter undertook the construction and equipment of the road. In 1856, whilst engaged upon this work, the members of the firm, together with Bestor, the president of the railroad company, Sweat, one of its directors, and Smith, its construction agent, entered into a contract with Wathen and Gibson, the defendants, by which the latter, being the owners of 160 acres of land, agreed, in consideration that the road then in process of construction should cross the Illinois Central Railroad where their land was situated, the land would be laid out into town lots and sold, and after proceeds amounting to \$4,800 had been received, which were to be retained by Wathen and Gibson, a conveyance of an undivided half of the residue should be made to the other parties. The only consideration for this agreement, aside from the location of the road, was that the other parties should assist and contribute to the building up of the town on the land. The road was constructed across the Illinois Central, and Wathen and Gibson laid out the land into lots, and proceeded to sell the same, and the town of El Paso was built on the land and an adjoining tract. In 1863 the plaintiffs filed their bill against Wathen and Gibson for an account of the sales and a conveyance of the undivided half of the lots unsold. The court held the contract void as against public policy, and dismissed the suit, and the decree in this respect was affirmed by the Supreme Court of the State, that court observing that when the people through their legislature grants to a company the right of eminent domain for the purpose of constructing a railroad it is upon the supposition that the road will bring certain benefits to the public, and that when subscriptions are made to its stock, the money is subscribed upon the understanding that the officers entrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders compatible with a proper regard for public convenience; that these alone are the considerations which should control officers of the road, and so far as they permit their official action to be swayed by their private interests they are guilty of a breach of trust towards the stockholders, and a breach of duty to the public at large; and it added: "A court of equity will not enforce a contract resting upon such official delinquency or even tending to produce it. Such is the character of the contract before us. If we enforce it we lend the sanction of the court to a class of contracts the inevitable tendency of which is to make the officers of these powerful corporations pervert their trust to their private gain, at the price of injury at once to the stockholders and to the public. Rendered into plain Eng-

lish, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line, and a depot built at a certain point. Now, if this was the best line for crossing the Illinois Central considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure to themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practising a species of fraud upon the defendants, and using a false pretext in order to acquire defendants' property without consideration. If on the other hand this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another, equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts because of the great temptation they would offer to official faithlessness, and corruption." The doctrine of this case was approved by the Supreme Court of Illinois in *Linder v. Carpenter*, 62 Ill. 309, and in *St. Louis, Jacksonville, and Chicago Railroad v. Mather*, 71 Ill. 592.

Holladay v. Patterson, decided by the Supreme Court of Oregon, 5 Oregon, 107, is also in harmony with *Fuller v. Dame and Bestor v. Wathen*, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company instead of to its directors, stockholders, or agents. But we do not refer to them, because there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place. *Pacific Railroad Co. v. Seely*, 45 Mo. 212; *Racine County Bank v. Ayers*, 12 Wis. 512 (*Vilas and Bryant's ed.* 570); *Fort Edward and Fort Millar Plank Road Co. v. Payne*, 15 N. Y. 583.¹ There is no exception in any decision called

¹ See also *New Haven v. New Haven R. R. Co.*, 62 Conn. 252; *Florida Central Co. v. State*, 31 Fla. 482; *Doane v. Chicago City Ry. Co.*, 45 N. E. Rep. (Ill.) 507; *Gray*

to our attention as to the character of a contract when for a pecuniary consideration directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies. As we said in *Tool Company v. Norris*, 2 Wall. 48, 56, "that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so we say of agreements like the one in this case; they are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan v. Arms Co.*, 103 U. S. 261, 274.

From the views expressed it follows that the court below erred in sustaining the demurrers to the special pleas above mentioned, and it is not necessary, therefore, to consider the other pleas. The judgment must be

*Reversed and the cause remanded with instructions to overrule the demurrer to the above pleas, and take further proceedings not inconsistent with this opinion.*¹

Mr. JUSTICE MILLER and Mr. JUSTICE BRADLEY dissented.

v. Chicago, &c. Ry. Co., 189 Ill. 400; *Lyman v. Suburban R. R. Co.*, 190 Ill. 320; *Chicago, &c. Ry. Co. v. Coburn*, 91 Ind. 557; *Louisville, &c. Ry. Co. v. Sumner*, 106 Ind. 55; *First Nat. Bank v. Hendrie*, 49 Iowa, 403; *Montclair Academy v. North Jersey St. Ry. Co.*, 65 N. J. L. 328; *Levy v. Tatum*, 43 S. W. Rep. (Tex. Civ. App.) 940; *Horner v. Chicago, &c. Ry. Co.*, 38 Wis. 165.

¹ *Heirs of Burney v. Ludelling*, 47 La. Ann. 73, 96; *Lum v. McEwen*, 56 Minn. 278, *acc.* Compare the following decisions in regard to the location of public buildings. *Fearnley v. De Mainville*, 5 Col. App. 441; *Woodman v. Innes*, 47 Kan. 26; *Beal v. Polhemus*, 67 Mich. 130.

GEORGE A. GUERNSEY v. JAMES P. COOK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 10—
SEPTEMBER 8, 1876.

[Reported in 120 Massachusetts, 501.]

COLT, J. The contract declared on has been held to be the personal contract of the defendant. 117 Mass. 548. It provided in substance on the part of the defendant and Mr. Beebe, who together owned a majority of the stock of the India Company, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back, and an allowance made for interest, "in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." The question is whether such a contract is void as being against public policy. Its decision depends upon the construction which must be fairly given to the terms of the contract.

In consideration of the purchase of a part of their stock at a price named, two of the stockholders agree to secure to the purchaser the treasurership of the corporation, of which they are members, and to secure to him also a sum named, as the annual salary of the office. The purchase of the defendant's stock and the agreement relating to the office are incorporated into the contract as part of one transaction; and each agreement is the valuable consideration of the other. (The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than defeat it, and the presumption is in favor of its legality.) But this contract necessarily implies that the defendant intended to derive, and the plaintiff intended to give to him, a private advantage, not shared by the other stockholders, in consideration of his election as treasurer. And there is nothing in the facts disclosed at the trial to show that such was not in fact the result of the transaction, or that the agreement in question was known and consented to by the other members of the corporation.

It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates.

In *Fuller v. Dame*, 18 Pick. 472, a contract was held to be contrary to public policy, and to open, upright, and fair dealing, which tended injuriously to affect the interest of the corporations of which the prom-

See also 117 Mass. 548. The contract was held to be void as against public policy.

see was a member. (It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where a stipulation for a separate and distinct advantage is held to be a fraud on other creditors and void. *Case v. Gerrish*, 15 Pick. 49. Upon the same principle, agreements not to bid against others at a public auction, as well as agreements for the employment of underbidders and puffers, are held to be a fraud upon the bidders at the sale, and void as against public policy. So contracts with brokers or agents, upon a consideration founded on violations of duty to the principal, are void. *Smith v. Townsend*, 109 Mass. 500; *Phippen v. Stickney*, 3 Met. 384; *Gibbs v. Smith*, 115 Mass. 592; *Curtis v. Aspinwall*, 114 Mass. 187. See also *Waldo v. Martin*, 4 B. & C. 319; *Marshall v. Baltimore & Ohio Railroad*, 16 How. 314; *Elliott v. Richardson*, L. R. 5 C. P. 744.

Upon the facts disclosed, this action, which is not in avoidance but in direct affirmance of the contract, cannot be maintained. *White v. Franklin Bank*, 22 Pick. 181. The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract. *Myers v. Meinrath*, 101 Mass. 366; *Taylor v. Chester*, L. R. 4 Q. B. 309.

*Judgment for the defendant.*¹

HENRY HOLCOMB v. THOMAS H. WEAVER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 25, 1883 —
JANUARY 29, 1884.

[Reported in 136 Massachusetts, 265.]

HOLMES, J. The plaintiff in New Bedford was written to from New York on behalf of the Pasque Island Club, and requested to find a builder who could erect a building for them cheaper than the New York builders. The letter continued, "but we only want parties that you can indorse in every way responsible and reliable." The plaintiff in

¹ *West v. Camden*, 135 U. S. 507; *Noel v. Drake*, 28 Kan. 265; *Noyes v. Marsh*, 123 Mass. 286; *Woodruff v. Wentworth*, 133 Mass. 309; *Wilbur v. Stoepel*, 82 Mich. 344; *Cone v. Russell*, 48 N. J. Eq. 208; *Fenness v. Ross*, 5 N. Y. App. Div. 342; *Snow v. Church*, 13 N. Y. App. Div. 108; *Gage v. Fisher*, 5 N. Dak. 297; *Withers v. Edwards*, 62 S. W. Rep. (Tex.) 795, acc.

See also *Elliott v. Richardson*, L. R. 5 C. P. 744; *Blue v. Capital Nat. Bank*, 145 Ind. 518; *McClure v. Law*, 161 N. Y. 78; *Gilbert v. Finch*, 173 N. Y. 455; *Wood v. Manchester, &c. Co.*, 54 N. Y. App. Div. 522; *Flaherty v. Cary*, 62 N. Y. App. Div. 1. But compare *Almy v. Orne*, 165 Mass. 126; *Gassett v. Glasier*, 165 Mass. 473; *Seymour v. Detroit, &c. Mills*, 56 Mich. 117; *Barnes v. Brown*, 80 N. Y. 527; *Bonta v. Gridley*, 77 N. Y. App. Div. 33.

reply introduced the defendant, who made his estimates, was employed, erected the building, and was paid. At an early stage of the proceedings, the plaintiff asked and obtained a promise from the defendant to pay him \$250, "as a commission or compensation for his trouble in the matter," which is the promise sued upon. The plaintiff testified that this promise was made without the knowledge of the club, but that he expected no pay from them for procuring the defendant to erect the building. The court ruled that the plaintiff could not recover; and the plaintiff excepted.

The ruling was clearly right. The plaintiff was not asked merely to introduce a possible contractor, who was to be dealt with by the club on the same footing as any one else, and to stand at no advantage in bargaining with them by reason of the introduction, as in *Rupp v. Sampson*, 16 Gray, 398. He was asked to recommend some one as in every way responsible. His recommendation obviously was expected to have weight with the club, and did have it. (If his agreement with the defendant was made before his recommendation, it had a necessary tendency to give a bias to what they knew the club relied on as disinterested.) [A recommendation under these circumstances would have been a fraud, even if gratuitous, and it is therefore immaterial whether the club was to pay for it or not, although it is hard to see why the plaintiff could not have recovered for his trouble if he had dealt fairly. If, then, the agreement was made at the time supposed, it was open to all the objections so fully stated in *Fuller v. Dame*, 18 Pick. 472, and was void by that and other Massachusetts decisions. *Rice v. Wood*, 113 Mass. 133. See also *Atlee v. Fink*, 75 Mo. 100; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Panama & South Pacific Telegraph v. India Rubber, Gutta Percha, & Telegraph Works*, L. R. 10 Ch. 515.

The agreement was open to the same objections on another ground, whether made before or after the plaintiff had written his recommendation. (It was made at all events before the defendant had completed his bargain with the club.) The parties knew that the club were seeking to get the work done as cheaply as they could get a trustworthy man to do it. (If the defendant had to pay the plaintiff, he would naturally charge it to the club in his estimate, or in some way make the club pay him back.) The tendency of the contract was to induce the defendant to charge, and to make the club pay, more than was necessary or fair, when the plaintiff had led them to expect that they would be dealt with honestly and economically, and certainly with no adverse interest emanating from the plaintiff.

We may add, that, if the date of the promise in suit were material and left in doubt, we should assume the fact to be that which was most favorable to the ruling; and also that, if the promise was made after the plaintiff had written to New York recommending the defendant, the plaintiff would have a good deal of difficulty in showing a consideration which was not executed before the promise was made. For the trouble for which the plaintiff was to have a commission obviously meant his

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recommendation of the defendant. He does not appear to have taken any other.

Judgment affirmed.

H. M. Knowlton and W. C. Parker, for the plaintiff.

T. F. Desmond, for the defendant.

SECTION V.

Miscellaneous Cases of Illegal Contracts.

HOLMAN ET AL. v. JOHNSON.

IN THE KING'S BENCH, JULY 5, 1775.

[Reported in 1 Cowper, 341.]

ASSUMPSIT for goods sold and delivered : Plea *non assumpsit*, and verdict for the plaintiff. Upon a rule to show cause why a new trial should not be granted, Lord Mansfield reported the case, which was shortly this : The plaintiff, who was resident at and an inhabitant of Dunkirk, together with his partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England ; they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

Mr. Mansfield, for the defendant.

Mr. Dunning, Mr. Davenport, and Mr. Buller, for the plaintiff.

LORD MANSFIELD. There can be no doubt but that every action tried here must be tried by the law of England ; but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another.

[The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant.] It is not for his sake, however, that the objection is ever allowed ; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this : *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of

a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis*.

The question therefore is, whether in this case the plaintiff's demand is founded upon the ground of any *immoral* act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What, then, is the contract of the plaintiff? It is this: being a resident and inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk. Where, then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in France, and brought home hither, or if glass bought abroad, which ought to pay a great duty, is run into England, shall the French tailor or the glass manufacturer stand to the risk or loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore, I am clearly of opinion that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any act of Parliament.

I am very glad the old books have been looked into. The doctrine Huberus lays down is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question thus (*Tit. de conflictu legum*, vol. ii. p. 539): "In certo loco merces quædam prohibita sunt. Si vendantur ibi, contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractus inde ab initio validus fuit." Translated, it might be rendered thus: In England, tea which has not paid duty is prohibited; and if sold there the contract is null

and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid. He goes on thus: "Verum si merces venditæ in altero loco, ubi prohibitæ sunt essent tradendæ, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the same manner. But if the goods sold were to be delivered in England, where they are prohibited, the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

The gist of the whole turns upon this, that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price; and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England. Therefore, let the rule for a new trial be discharged.

The three other judges concurred.

PEARCE AND ANOTHER v. BROOKS.

IN THE EXCHEQUER CHAMBER, APRIL 17, 1866.

[Reported in *Law Reports*, 1 *Exchequer*, 213.]

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid in addition to the 50*l.*, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, nonpayment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q. C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected to be paid out of the receipts of defendant's prostitution was a material allegation, and had not been proved. *Bowry v. Bennet*, 1 Camp. 348.

[*POLLOCK*, C. B., referred to *Cannan v. Bryce*, 3 B. & A. 179.]

Digby Seymour, Q. C., and *Beresford*, showed cause. No direct evidence could be given of the plaintiffs' knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[*BRAMWELL*, B. At the trial I was at first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street-walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, showed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of

visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of *Bowry v. Bennett*, 1 Camp. 348, falls short of proving that the plaintiff must intend to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiffs' knowledge of the defendant's way of life was "very slight;" and Lord Ellenborough appears to have referred to the intention as to payment, not as a legal test, but as a matter of evidence with reference to the particular circumstances of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shown that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is *Lloyd v. Johnson*, 1 B. & P. 340, cited in the note to the last case, an authority for the plaintiffs, for there part of the contract would have been innocent, and all that the court says is, that it cannot "take into consideration which of the articles were used by the defendant to an improper purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340, where the plaintiff was not allowed to recover for the use of lodgings let for the purpose of prostitution. *Appleton v. Campbell*, 2 C. & P. 347, is to the same effect.

M. Chambers, Q. C., and *J. O. Griffiths*, in support of the rule. As to the first point, the expressions of Buller, J., in *Lloyd v. Johnson*, 1 B. & P. at p. 341, are strongly in the plaintiffs' favor, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of enabling two persons to meet there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material; the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in *Bowry v. Bennett*, 1 Camp. 348, are very plain; the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[*BRAMWELL*, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with it to shoot a man and rob him; is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he *shall* be so paid?]

Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[BRAMWELL, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[MARTIN, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C. B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say that since the case of *Cannan v. Bryce*, 3 B. & A. 179, cited by Lord Abinger in delivering the judgment of this court in the case of *M'Kinnell v. Robinson*, 3 M. & W. at p. 441, and followed by the case in which it was so cited, I have always considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in *Cannan v. Bryce*, 3 B. & A. 179; that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench

and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favorable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my brother Bramwell that the verdict was right, and that the rule must be discharged.¹

*Rule discharged.*²

CHESTER H. GRAVES AND OTHERS v. WALTER B. JOHNSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 26 – MAY 6, 1892, AND MARCH 18 – MAY 22, 1901.

[Reported in 156 *Massachusetts*, 211, and 179 *Massachusetts*, 53.]

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the

¹ MARTIN, PIGOTT, BRAMWELL, BB., and POLLOCK, C. B., delivered concurring opinions.

² See the English decisions reviewed in Benjamin on Sales, § 506, *et seq.* Compare *Postelle v. Rivers*, 112 Ga. 850; *Hubbard v. Moore*, 24 La. Ann. 591; *Sampson v. Townsend*, 25 La. Ann. 78; *Mahood v. Tealza*, 26 La. Ann. 108; *Anheuser-Busch Brewing Assoc. v. Mason*, 44 Minn. 318; *Sprague v. Rooney*, 83 Mo. 493, 104 Mo. 349; *Ernst v. Crosby*, 140 N. Y. 364; *Bishop v. Honey*, 34 Tex. 245; *Reed v. Brewer*, 90 Tex. 144; *Hunstock v. Palmer*, 23 S. W. Rep. (Tex. Civ. App.) 294; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670.

English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. *Holman v. Johnson*, 1 Cowp. 341; *Pollock*, Con. (5th ed.) 308. See also *M'Intyre v. Parks*, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce (*Pellecat v. Angell*, 2 Cr., M. & R. 311, 313), and has not escaped criticism (*Story*, Conf. Laws, §§ 257, 264, note, 3 Kent Com. 265, 266, and *Wharton*, Conf. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 B. & C. 93, 98, 99; *Harris v. Runnels*, 12 How. 79, 83, 84.

Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. *Pollock*, Con. (5th ed.) 308. (The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme) *Waymell v. Reed*, 5 T. R. 599; *Gaylord v. Soragen*, 32 Vt. 110; *Fisher v. Lord*, 63 N. H. 514; *Hull v. Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. (In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act.) *Hayes v. Hyde Park*, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. (But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law.) *Tracy v. Talmage*, 4 Kernan, 162; *Hodgson v. Temple*, 5 Taunt. 181. So of the law of another State. *M'Intyre v. Parks*, 3 Met. 207; *Sortwell v. Hughes*, 1 Curt. C. C. 244; *Green v. Collins*, 3 Cliff. 494; *Hill v. Spear*, 50 N. H. 253. (*Dater v. Earl*, 3 Gray, 482, is a decision on New York law.)

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. *Finch v. Mansfield*, 97 Mass. 89, 92; *Suit v. Woodhall*, 113 Mass. 891, 895. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. *Pearce v. Brooks*, L. R. 1 Ex. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as implied in the statement that it was made with a view to such a breach, it is void. *Webster v. Munger*, 8 Gray, 584; *Orcutt v. Nelson*, 1 Gray, 536, 551; *Hubbell v. Flint*, 13 Gray, 277, 279; *Adams v. Coulliard*, 102 Mass. 167, 172, 173. Even in *Green v. Collins* and *Hill v. Spear*, the decision in *Webster v. Munger* seems to be approved. See also *Langton v. Hughes*, 1 M. & S. 593; *M'Kinnell v. Robinson*, 3 M. & W. 434, 441; *White v. Buss*, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in *Hayes v. Hyde Park*, 153 Mass. 514, and *Tasker v. Stanley*, 153 Mass. 148. The overt act of selling, which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. (But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it.) As the connection between the act in question, the sale here, and the illegal result, the same in Maine — the tendency of the act to produce the result — is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare *Commonwealth v. Churchill*, 136 Mass. 148, 150. (It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act.) See *Commonwealth v. Harrington*, 3 Pick. 26.

The ground of the decision in *Webster v. Munger* is, that contracts

like the present are void. If the contract had been valid, it would have been enforced. *Dater v. Earl*, 3 Gray, 482; *M'Intyre v. Parks*, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied, whether the law to be violated is that of the State of the contract or of another State (see *Tracy v. Talmage*, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens. *Territt v. Bartlett*, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by *Webster v. Munger*, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. *Banchor v. Mansel*, 47 Maine, 58.

Exceptions sustained.

HOLMES, C. J. This is the second time that this case comes before this court. 156 Mass. 211. It is a suit for the price of intoxicating liquors sold here. [At the first trial it was found that they were sold with a view to their being resold by the defendant in Maine against the laws of that State; and on that state of facts it was held that the action would not lie. At the second trial it was found that the plaintiffs' agent supposed, rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were and were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. Seemingly the plaintiffs did not act in aid of the defendant's intent beyond selling him the goods. The judge refused to rule that the plaintiffs' knowledge of the defendant's intent would prevent their recovery, and the case is here again on exceptions.]

The principles involved are stated and some of the cases are collected in the former decision. All that it is necessary for us to say now is that in our opinion a sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent, closely enough to make the sale unlawful. It will be observed that the finding puts the plaintiffs' knowledge of the defendant's intent no higher than an uncommunicated inference as to what the defendant was likely to do. Of course the defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, such as was supposed in the former decision, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (*Commonwealth v. Peaslee*, 177 Mass. 267; *Commonwealth v. Kennedy*, 170 Mass. 18, 22), the line of proximity will vary somewhat according to the gravity of the evil ap-

prehended, *Steele v. Curle*, 4 Dana, 381, 385-388, *Hanauer v. Doane*, 12 Wall. 342, 446, *Bickel v. Sheets*, 24 Ind. 1, 4,¹ and in different courts with regard to the same or similar matters. Compare *Hubbard v. Moore*, 24 La. Ann. 591; *Michael v. Bacon*, 49 Mo. 474, with *Pearce v. Brooks*, L. R. 1 Ex. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. *M'Intyre v. Parks*, 3 Met. 207; *Sortwell v. Hughes*, 1 Curt. C. C. 244, 247; *Green v. Collins*, 3 Cliff. 494; *Hill v. Spear*, 50 N. H. 253; *Tracy v. Talmage*, 4 Kernan, 162; *Distilling Co. v. Nutt*, 34 Kan. 724, 729; *Webber v. Donnelly*, 33 Mich. 469; *Tuttle v. Holland*, 43 Vt. 542; *Braunn v. Keally*, 146 Pa. St. 519, 524; *Wallace v. Lark*, 12 S. C. 576, 578; *Rose v. Mitchell*, 6 Col. 102; *Jameson v. Gregory*, 4 Met. (Ky.) 363, 370; *Bickel v. Sheets*, *Hubbard v. Moore*, and *Michael v. Bacon*, *ubi supra*.²

Although a different rule was assumed in *Suit v. Woodhall*, 113 Mass. 391, it will be seen that it equally was assumed by the instructions given at the trial, and that the exceptions and the point decided in that case concerned only the imputation to the plaintiffs of their agent's knowledge. *M'Intyre v. Parks* never has been overruled. *Dater v. Earl*, 3 Gray, 482; *Webster v. Munger*, 8 Gray, 584, 587; *Adams v. Coulliard*, 102 Mass. 167, 172; *Milliken v. Pratt*, 125 Mass. 374, 376.

Exceptions to the admission of letters of the plaintiffs' agent to them for the purpose of showing what they knew are not argued.

Exceptions overruled.

CHURCH ET AL. v. PROCTOR.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, FEBRUARY 2, 1895.

[Reported in 66 *Federal Reporter*, 240.]

In error to the Circuit Court of the United States for the District of Rhode Island.

¹ See also *Green v. Collins*, 3 Cliff. 494; *Tracy v. Talmage*, 14 N. Y. 162, 215.

² *Longnecker v. Shields*, 1 Col. App. 264; *Singleton v. Bank of Monticello*, 113 Ga. 527; *Sondheim v. Gilbert*, 117 Ind. 71; *Jackson v. City Bank*, 125 Ind. 347; *Brunswick v. Vallean*, 50 Iowa, 120; *Feineman v. Sacho*, 33 Kan. 621; *Tyler v. Carlisle*, 79 Me. 210; *Gambs v. Sutherland's Est.*, 101 Mich. 355; *Chamberlin v. Fisher*, 117 Mich. 428; *Delavina v. Hill*, 65 N. H. 94; *Bryson v. Holly*, 68 N. H. 327; *Amey v. Granite State Ins. Co.*, 68 N. H. 446; *Waugh v. Beck*, 114 Pa. 422; *Gaylord v. Soragen*, 32 Vt. 110, acc. See also *Corbin v. Wachhorst*, 73 Cal. 411.

But see, *contra*, *Milner v. Patton*, 49 Ala. 423; *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Ware v. Jones*, 61 Ala. 288; *Lewis v. Latham*, 74 N. C. 283; and compare *Plank v. Jackson*, 128 Ind. 424; *Williamson v. Baley*, 78 Mo. 636; *Fisher v. Lord*, 63 N. H. 514; *Hill v. Ruggles*, 56 N. Y. 424; *Arnot v. Pittston Coal Co.*, 68 N. Y. 558; *Materne v. Horwitz*, 101 N. Y. 469; *Spurgeon v. McElwein*, 6 Ohio, 442; *Mordecai v. Dawkins*, 9 Rich. L. 262; *Oliphant v. Markham*, 79 Tex. 543; *Aiken v. Blaisdell*, 41 Vt. 655; *Mound v. Barker*, 71 Vt. 253.

This was an action by Joseph O. Proctor, Jr., against Daniel T. Church and others, to recover damages for breach of a contract. On the trial in the circuit court, the jury gave a verdict for the plaintiff. Defendants bring error.

William G. Roelker, for plaintiffs in error.

William A. Pew, Jr., Thomas A. Jenckes, Charles A. Wilson, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

ALDRICH, District Judge.¹ At the time the parties entered into the contract involved in this controversy, Proctor, the plaintiff below, was engaged in a general fishing business at Gloucester, in the State of Massachusetts, and in preparing and placing on the general market different kinds of fish, and especially in splitting and salting a fish called "menhaden," and placing the same upon the market; and the defendants, at Tiverton, in the State of Rhode Island, were engaged in the business of catching and supplying menhaden. [By the terms of the contract the defendants agreed to sell, and the plaintiff to buy, such quantities of menhaden as should be reasonably required by the plaintiff's business, in no event, however, in excess of the defendants' catch.]

It is said by Church & Co. that, looking further to the subject-matter as disclosed by the record, the contract is altogether void, for the reason that it is against public policy. The ground of this objection, stated generally, is that Proctor, taking advantage of the scarcity of mackerel in 1888, conceived the idea of putting upon the markets generally the menhaden, as a food fish, split and salted, packed in barrels, tubs, pails, and other packages, and variously branded with misleading and deceptive marks and characters, as, for instance, "Alaska Mackerel, for Family Use." Proceeding upon the theory that the facts, if shown, would disclose a contract which would not be upheld, Church & Co. offered evidence to show the character of the marks and brands placed upon the casks and barrels containing the fish, and upon Proctor's objection, this evidence was excluded, subject to exception. At the conclusion of all the evidence in the case, the defendants moved for a verdict "on the ground that it appeared from the plaintiff's testimony that the purpose for which he intended to use and did use the fish which were the subject-matter of the contract sued upon was illegal, and against public policy, as being a fraud and an imposition on the public, and * * * illegal, in being in violation of chapter 114 of the Public Statutes of Rhode Island." The court below refused to direct the verdict, and the defendants excepted.

The record does not clearly show that Proctor's deceptive and unwarrantable purpose existed during the entire period covered by the contract, and for this reason the court below could not have properly directed a verdict upon the ground stated in the motion. We think.

¹ A portion of the opinion, relating to the construction of the contract, is omitted.

however, that Church & Co., under the line of defence disclosed, were entitled to show fully the purpose of Proctor at the time of the contract, the use which he made of the fish furnished, and the manner in which they were placed upon the market, and that the court erred in excluding evidence as to the marks and brands upon the casks and barrels. The evidence excluded was competent and material upon the issue raised by the defence, and would tend to show that the public was being deceived and cheated through false and misleading brands and characters used for the purpose of advancing the sale of a product beyond that which would result from its true merit. The point is made that the Rhode Island statute does not apply, for the reason that the evidence shows that the fish in question were designated as "salted fish," while the statute has reference to "pickled fish." This is a distinction which the trade might make, but which, perhaps, the jury would not be required to make, or which, if made, might have been overcome by the jury in view of evidence that the fish were put up for the trade in barrels and casks and in closed packages of various forms. All pickled fish in the ordinary fish business are salted, although all salted fish are not pickled. In view of all the evidence, we cannot say that the jury would not have been warranted in finding that the witnesses in using the term "salted fish" intended to describe the fish in question as pickled. The purpose of the evidence, as to the manner of placing the fish upon the market, was a double one, first, to show that statute of Rhode Island was violated, and, second, to show a scheme which involved a fraud on the consumers of fish as an article of food. As bearing upon the general question whether Proctor's purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor's manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. Chapter 114 of the Public Statutes of Rhode Island, which was in force in 1888, provides, among other things, that "casks for menhaden and herrings shall be of the capacity to hold twenty-eight gallons," and "every cask before being packed or repacked for exportation shall be first searched, examined, and approved by a packer, and shall, when so packed or repacked for exportation, be branded legibly on one head with the kind of fish it contains and the weight thereof, or the capacity of the cask with the first letter of the Christian and the whole of the surname of the packer, the name of the town, and the words Rhode Island, in letters not less than three-fourths of an inch long, to denote that the same is merchantable and in good order for exportation." It is further provided, through section 8 of the same statute, that "every person who shall offer for sale in or attempt to export from the State any pickled fish which have not been approved by a sworn packer, or in casks which are not branded as aforesaid, shall forfeit fifty dollars for each offence." It is manifest that

this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be successfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not conform to the statute, but that the packages were falsely marked. The maxim, "*Ex dolo malo non oritur actio*," fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish, within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from non-delivery of the subject-matter intended to be used in violation of the statute law. Bank v. Owens, 2 Pet. 527, 539; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884; Forster v. Taylor, 5 Barn. & Adol. 887; Eaton v. Keegan, 114 Mass. 434; Pol. Cont. 322; Curtis v. Leavitt, 15 N. Y. 9; Benj. Sales, § 654.

Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing, undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defence. This is not an answer. The defence of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practising imposition. It would be a strange rule of law which would extend relief to a *particeps criminis*, and withhold relief from an innocent party, who seeks to avail himself of its protection when the imposition is discovered. Cowan v. Milbourn, L. R. 2 Exch. 230; Spotswood v. Barrow, 5 Exch. 110; Holman v. Johnson, Cowp. 341. The wholesome and salutary maxim, "*Ex turpi causa non oritur actio*," has been so far enlarged that it may now be said that the law will not afford a remedy to a wrongdoer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration, or the innocence, or lack of innocence,

of the party who seeks to interpose the objection. It becomes a defence, and may be interposed whenever the fraud is discovered. It must be observed, however, that it would not always be enough to avoid a contract for a sale of articles innocent of themselves that the party who acquired them, or sought to acquire them, occasionally used them unlawfully. In order that this doctrine should operate in avoidance of a contract, except where the illegality involves life, or offences of the higher grade, it must appear that the party acquiring the product intended to use it unlawfully when the contract was made, or when possession was sought, or that he was engaged in a general scheme involving illegality, or the general purpose was to use the product in a deceptive and fraudulent manner. The record shows that the "plaintiff testified that under the arrangement contemplated by him, and the contract made with the defendants, the fish were to be landed at Still's Wharf, at Tiverton, in the State of Rhode Island, and immediately there split and salted, and packed up in barrels, tubs, pails, and other packages, and marked and branded and shipped to fill these orders to various parts of the country, and that all the fish that were actually received by him under this contract with the defendants, and otherwise during the season of 1888, at Tiverton, R. I., were so packed and marked there on the spot," and shipped from that point. It also shows that the barrels, casks, and packages were variously branded "Alaska Mackerel," "Russian Mackerel," "California Mackerel," "Family White Fish," and "Fat Family Silversides." It is obvious that the real object of marking the packages thus was to make the product "appear to be what it was not, and thus induce unwary purchasers,"—*Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, — who could not scrutinize the contents, to buy it as mackerel.

Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not. Looking at the record as a whole, however, it does not clearly and distinctly appear when the plaintiff below entered upon such scheme or business, and for this reason we cannot say there was error in the refusal of the court to direct a verdict for the defendants. If upon any subsequent trial this issue should be raised, and evidence adduced in support thereof, we think the jury should be instructed that no damages can be recovered, and no action maintained, covering any period in which the plaintiff below contemplated, or was actually engaged, in placing upon the market the fish described in the contract, under false,

deceptive, and misleading brands, designed to attract and induce trade. During the time he entertained such purpose (*Cowan v. Milbourn*, L. R. 2 Exch. 230, 236; *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331), or was actually engaged in such business, the law will not help him. The verdict should be set aside for the reasons stated, and it becomes unnecessary to consider the other questions raised by the plaintiffs in error. *Judgment of the circuit court reversed; new trial ordered.*

COWAN v. MILBOURN.

IN THE EXCHEQUER CHAMBER, APRIL 24, 1867.

[Reported in *Law Reports 2 Exchequer*, 230.]

ACTION (in the Court of Passage, Liverpool) for breach of a contract to let rooms to the defendant. The first and third counts of the declaration related to contracts to let to the defendant the St. Anne's Assembly Rooms, Liverpool, for the purpose of lectures, which were to be delivered there on the 20th of January and the 3d of February, 1867; and the second count related to a contract to let the same rooms to the defendant for the purpose of a ball and tea-party on the 29th of January.

To these counts the defendant, amongst other pleas, pleaded, fourthly, that, after making the alleged agreements respectively, the defendant was informed, and learned for the first time, that the plaintiff intended (as he did in fact intend) to use the rooms for certain irreligious, blasphemous, and illegal lectures or entertainments; whereupon the defendant, within a reasonable time, after satisfying himself as to the truth of the premises, gave notice to the plaintiff that he could not permit the plaintiff the use of the rooms for the purposes aforesaid, and thereupon notified to the plaintiff not to incur any further or other expense in relation thereto; and in like manner, and within such reasonable time as aforesaid, tendered and paid to the plaintiff the amount of the moneys which the plaintiff had paid him for the intended use of the rooms; and that his refusal to permit the plaintiff under the said circumstances, and for the said purposes, to use the rooms was the breach complained of.

The defendant, by his seventh plea, also relied upon the provisions of 21 Geo. 3, c. 49, s. 1.

Issue.

At the trial the following facts appeared in evidence:—

In December, 1865, the plaintiff, who was secretary to the Liverpool Secular Society, hired of the defendant, through defendant's son, the rooms in question, for Sunday, the 20th of January, for the pur-

pose of having lectures delivered there in advancement of the views of the society. He did not communicate to the defendant the subjects of the lectures, nor that they were to be delivered in connection with the society. He afterwards hired the same rooms for the delivery of lectures on Sunday, the 3d of February, and for a ball and tea-party in memory of Tom Paine, on the 29th of January. On the 5th of January the subjects of the lectures for the morning, afternoon, and evening of the 20th of January were advertised by placards as "The Soul: its Nature and Destination;" "The Character and Teachings of Christ: the former Defective, the latter Misleading;" "Bible Morality and Bible Science;" and those of the lectures for the 3d of February as "The Sceptical Tendency of Bishop Butler's Analogy;" "The Bible shown to be no more Inspired than any other Book, with a Refutation of Modern Theories thereon." "Catholicism, Protestantism, and Secularism: which contains most Truth, and which is best calculated to benefit Humanity?"

On the 17th of January the plaintiff received from the defendant's son a letter written the day previous, complaining of an evening lecture having been advertised, and alleging that the rooms were only let for the morning and afternoon, but making no complaint of the subject of the lectures; and on the 19th of January the defendant received from the plaintiff's attorney a letter of that date, entirely refusing the use of the rooms, but not assigning any reason.

The plaintiff, having attempted without success to obtain possession of the rooms on the days in question, brought this action for breach of the several contracts.

It appeared upon the evidence of the chief constable of Liverpool, who was called for the defendant, that the defendant's refusal was caused by his interference, and by his threatened opposition to a renewal of the license attached to the rooms.

The learned judge ruled that the lectures announced were blasphemous and illegal, and that the plaintiff could not therefore recover on the agreement for the Sundays (20th of January and 3d of February), but that he might recover on the agreement relating to the tea-party of the 29th of January; (and a verdict for one farthing damages was found for the plaintiff on the second count) and a verdict was entered for the defendant on the first and third counts, (with leave to the plaintiff (under 16 & 17 Vlt. c. xxi. s. 45) to move this court to enter a verdict for the plaintiff for £10 on each of those counts.)

Little moved accordingly.

BRAMWELL, B.¹ I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, "by teaching or advised speaking," "denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." That he intended to use the rooms for the

¹ KELLY, C. B., and MARTIN, B., delivered concurring opinions.

purposes declared by the statute to be unlawful is perfectly clear, for he proposed to show that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose. Neither if he had let the plaintiff into possession could he, for the same reason, have recovered the price for their letting. It is said, he did not know of this purpose, or, at least, did not regard it, and gave another and different reason. But, having refused to let the rooms, he might justify it on any ground that would support the refusal. This is laid down in *Spotswood v. Barrow*, 5 Ex. 110; where in an action for wrongful dismissal the defendant justified on the ground that the plaintiff had misappropriated moneys, and the court held that the plea was supported, although the defendant failed to show that the fact was known to him before he dismissed the plaintiff. Rolfe, B., there says: "The subject may be illustrated by what was said in *Doe & Daniell v. Woodruffe*, 10 M. & W. 608, at p. 632, namely: 'Where a party having a right of entry enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry.' Littleton, s. 695, is there referred to; and that old authority seems to me to be founded on very good sense." This appears to me to be good law, and the reason of it is apparent. You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, "Go to law and I will tell you." And your justification will depend on whether in fact and law he could compel you to perform. Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it.

Rule refused.

SCOTT v. BROWN, DOERING, McNAB, & CO.

SLAUGHTER & MAY v. BROWN, DOERING, McNAB, & CO.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, JULY 16, 18,
AUGUST 1, 1892.

[Reported in [1892] 2 *Queen's Bench*, 794.]

A. L. SMITH, L. J.¹ The plaintiff Scott applies to this court to set aside a nonsuit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Company, and for the return of £632 3s. 5d., paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the £632 3s. 5d. sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant McNab that McNab should therewith purchase five hundred shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. [Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.]

[If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law.] It has been held that it is a criminal conspiracy for two or more to agree by false rumors to endeavor to raise the price of the public funds on a particular day. *Rex v. Berenger*, 3 M. & S. 67. It has also been held, in *Reg. v. Aspinall*, 1 Q. B. D. 730, 2 Q. B. D. 48, that an agreement by two or more to cheat and defraud by means of false pretences those who might buy

¹ LINDLEY, L. J., and LOPEZ, L. J., delivered concurring opinions.

shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See *Reg. v. Hudson, Bell*, C. C. 263. Lopes, L. J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment, are sufficient. (These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the company, by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's £632 3s. 5d. by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case, as showing the purposes for which the plaintiff and the defendant McNab had agreed that the purchases should be made.) (The agreement between two or more to do an illegal act has been proved.)

The next question is, Was it shown that the plaintiff and McNab agreed to carry out this intention by illegal means, — viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed, — viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. (It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his £632 3s. 5d. to McNab to purchase shares with upon the open market, and if that had been all, I agree;) but the question is, (Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer, — a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company? I am of opinion that it was.)

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the same proposition, — viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. (The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.)

Now, how does the law stand upon the subject? (If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality; then the courts will not

assist him in his cause of action.] This was decided in *Taylor v. Chester*, L. R. 4 Q. B. 309, where the illegality was pleaded, and also in *Begbie v. Phosphate Sewage Co.*, Law Rep. 10 Q. B. 491, where it was not pleaded, but, the fraud being apparent, the court would not interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants, — viz., to "keep up the price of the shares," which upon the evidence was shown to be "to create a fictitious premium."

In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim "*In pari delicto potior est conditio possidentis*" applies, and this court ought not to assist the plaintiff when he seeks to recover the £632 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.¹

Appeal dismissed.

SIMEON N. FROST v. SETH GAGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1862.

[Reported in 3 Allen, 560.]

CONTRACT. At the second trial of this case, after the facts reported in 1 Allen, 262, had been proved, the plaintiff offered in evidence a release of their several claims by the creditors of Richard Frost, and Richard testified that, after the release had been signed by the plaintiff and defendant, the latter procured the signatures of other creditors to the same, and delivered it to him, and he thereupon executed the assignment to the defendant. The defendant then offered to prove that he was Richard's largest creditor; that the plaintiff, who was Richard's son, requested him to aid in obtaining a settlement with Richard's creditors, and promised to make no claim upon him for any part of the proceeds of Richard's estate which might come into his hands as assignee, but to allow him to retain the plaintiff's share for his services, and also to execute to him a promissory note for a further sum, if he would sign the release and procure the signatures of

¹ See also *Nickerson v. English*, 142 Mass. 267.

other creditors to the same; and that he, being induced by said promise, did sign the release and procure the signatures of other creditors to the same. Morton, J., rejected this evidence, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

W. P. Webster, for the defendant.

A. F. L. Norris, for the plaintiff.

BIGELOW, C. J. The right of the plaintiff to maintain his action on the second count, on proof of the facts therein set forth, was determined at the former hearing of this case. 1 Allen, 262. The only point now raised which was not then considered by the court arises on the evidence offered by the defendant to show that there was an agreement between him and the plaintiff, by which the former agreed to sign the composition deed and procure the release of the other creditors of Richard Frost on a promise by the latter to pay a portion of the debt due from said Richard to the defendant, in addition to the dividend which he might receive under the assignment, in common with the other creditors. That such an agreement would be a fraud on the other creditors,¹ and that the defendant could maintain no action upon it against the plaintiff, is too clear to admit of any doubt.² It was a secret and underhand contract, by which the defendant secured to himself an advantage over other creditors of the insolvent, while at the same time he was holding out to the same creditors that he was to share in the assets equally with them, and thereby inducing them to sign the composition deed and release the debtor from their claims. Story on Eq. § 378; Cockshott v. Bennett, 2 T. R. 763, 766; Lewis v. Jones, 4 B. & C. 511; Case v. Gerrish, 15 Pick. 49. The question then presents itself, whether such a fraudulent agreement can be set up by the defendant, who was a party to it, as a defence to an action by the plaintiff to recover the same share or dividend of the assets of the debtor as has been paid to the other creditors by the defendant. This is in some respects a novel question; but it seems to us to come within principles recognized in the adjudged cases, by the application of which it can be readily solved. Assuming that the defendant could establish all the facts contained in his offer of proof, it is clear that the plaintiff was a party to the fraudulent agreement by which the signatures of the other creditors to the release of the debtor were obtained. It was by his procurement, and on a promise by him to pay the defendant a portion of his debt beyond the amount which he would receive from the estate of the debtor, that the latter was induced to sign the release and to become the agent in procuring the signatures of the other creditors. It was through the procurement and instrumentality of the plaintiff, and by means of an agreement

¹ Such creditors would, therefore, not be bound by their agreement to release the debtor from the unpaid portion of his debts. 6 Am. and Eng. Encyc. of Law (2d ed.), 394.

² See many cases cited in 6 Am. and Eng. Encyc. of Law (2d ed.), 395.

which operated as a fraud on the other creditors, to which he was a party, and for which he furnished the consideration, that the composition and release were obtained. He was therefore a participator in the fraud. Holding the relation of a creditor, and bound to act with good faith towards the other creditors, in entering into an agreement with them to compound with their debtor, and to release him from their debts, he became a party to an agreement by which a secret advantage was attempted to be secured to the defendant, by which he was induced to become a party to the assignment and release, and thereby to hold out false colors to the other creditors, and lead them to believe that all were acting on equal terms, and to grant a discharge to their debtor on the faith that all were to receive a like proportion of their respective debts. To adopt the significant figure which has been used to describe the effect of a transaction of this nature in *Story on Eq. § 378*, the plaintiff did not himself act as a decoy duck to mislead the other creditors, but he did that which was quite as effectual in accomplishing the fraud on them: he procured the duck, and placed him in a position in which he was enabled to practise a deception, and to draw the creditors into an arrangement with their debtor to which otherwise they might not have assented. In this aspect of the case, we do not see that the plaintiff stands in any better situation, or is entitled to any greater favor in a court of law than the defendant. As participators in the fraud, they both stand on an equal footing. Neither can claim to recover anything in an action which can be maintained only by proof of a transaction into any part of which his fraud has entered as an essential element, affecting any rights of any parties interested therein. It is on this ground that it has been held that a creditor cannot recover his share or dividend under a composition deed to which he became a party, if he had previously taken a private agreement for the payment of the residue of the debt. His right to recover the amount to which the fraudulent agreement did not extend is forfeited by his participation in a fraud connected with another part of the same transaction. The whole is regarded as an entire agreement, which is vitiated by the fraudulent act of the party, as to him, so that he can claim no benefit under any of its provisions. *Higgins v. Pitt*, 4 Exch. 323; *Knight v. Hunt*, 5 Bing. 432; *Howden v. Haigh*, 11 Ad. & El. 1033; *Forsyth on Composition with Creditors*, 152. It is quite immaterial that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agreement. The fraud consists, not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors. Such an agreement vitiates the whole transaction, so that the party can claim no benefit under a composition into which

he entered in consequence of such corrupt or fraudulent contract. It is quite clear, therefore, that the defendant, if he did not stand in the position of assignee having possession of the assets, and were compelled to bring an action for the share or dividend on his debt which might be coming to him in common with the other creditors, could not recover. The agreement into which he entered with the plaintiff would be a bar to his right to recover even that sum to which the fraudulent agreement did not extend. For a like reason, the plaintiff in this suit ought not to be allowed to recover. The fraud in which he participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate.¹

It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defence the illegality of a transaction on which a cause of action is founded. Such defences are allowed, not out of favor to defendants, or to protect them from the effects of their unlawful contracts, but on grounds of public policy, which does not permit courts of justice to be used to aid either party in enforcing contracts which are unlawful or tainted with fraud, but leaves them in the condition in which their illegal or immoral acts have placed them.

We are therefore of opinion that the evidence offered at the trial was competent, and that it should have been admitted and submitted to the jury, with instructions in conformity to the principles above stated.

Exceptions sustained.

SIMON KULLMAN ET AL., RESPONDENTS, v. JACOB GREENE-
BAUM ET AL., APPELLANTS.

CALIFORNIA SUPREME COURT, DECEMBER 17, 1891.

[Reported in 92 California, 403.]

APPEAL from an order of the Superior Court of the city and county of San Francisco denying a new trial.

¹ Compare the following decisions, which hold that money paid by a debtor to secure a creditor's assent to a composition may be recovered by the debtor. *Atkinson v. Denby*, 6 H. & N. 778; 7 H. & N. 934; *Bean v. Brookmire*, 2 Dill. 108; *Bean v. Amsink*, 10 Blatchf. 361; *Brown v. Everett, &c. Co.*, 111 Ga. 404; *Crossley v. Moore*, 40 N. J. L. 27. But see *Solinger v. Earle*, 82 N. Y. 393.

The action was brought to recover the sum of eighteen thousand dollars for the conversion by the defendants of mining stocks belonging to the plaintiffs valued at that sum, which the defendants refused to deliver to the plaintiffs upon demand made upon them on the second day of December, 1886. The complaint alleges that thereafter, on the tenth day of December, 1886, they were fraudulently induced to sign a pretended composition of the creditors of the defendants, which was fraudulent and void as to them by reason of secret preferences of other creditors, of which the plaintiffs were ignorant, and which they rescinded upon discovery of the fraudulent preferences. The plaintiffs recovered judgment for the whole amount claimed as the value of the stocks. Further facts are stated in the opinion of the court.

John R. Jarboe, William S. Goodfellow, and Edward R. Taylor,
for appellants.

Wal. J. Tuska, for respondents.

MCFARLAND, J. The main question in this case is about the validity of a composition deed, by which the respondents and the other creditors of appellants agreed to receive *pro rata* the proceeds of the sale of appellants' assets, and thereupon to release them from all claims and demands. (Respondents contend that said agreement is invalid, because a fraudulent preference was given to certain of the creditors who signed it, and the court below so found.) (The court found, as facts, that some of the creditors at first refused to sign the agreement, and that, to induce them to sign, "some of the relatives and friends of the defendants did pay such creditors the full amount of their several demands, with the knowledge, but without the direction of the defendants, and not out of the assets of the said defendants, nor under any promise or expectation of repayment, and thereby did make a preference of such creditors, and induced them to sign the said composition; and that such creditors did receive a larger proportion or sum than secured by said agreement; of all of which facts the plaintiffs at the time of signing such composition were ignorant, and upon the discovery thereof notified the defendants," etc.

We think that the ruling of the court below was right, and in line with the current of authorities. The general rule is correctly laid down in Story's Equity Jurisprudence, § 378; and we stated it quite fully in the recent case of *O'Brien v. Greenebaum*, *ante*, p. 104. (It is strenuously argued by counsel for appellants that the principle does not apply here, for the reasons that the payments to the preferred creditors were not made by the debtors or their agents, and particularly that the payments were not made out of the debtors' assets) — that is, out of the actual and disposable property which they then had. (It is to be noticed, however, that the appellants knew of these secret payments to preferred creditors; and as the utmost good faith is required in such transactions, the appellants can hardly be said to be innocent of the imposition practised upon respondents.) But beyond all that, the rule

Sp. & Law to Gay.

does not, by any means, rest solely upon the participation of the debtor in the fraud, and the diminution of the actual assets. In a composition agreement each creditor is a party as to each other creditor, as well as to the debtor. (Creditors sign upon the consideration that others sign upon the same terms; and if they are deceived, they are misled into an act to which they might not otherwise have assented.) (See *Story's Eq. Jur.*, § 379, and notes.) *Solinger v. Earle*, 82 N. Y., 393, was a case where a brother-in-law (as in the case at bar) had given his note to induce a creditor to sign a composition deed; and in the opinion of the court in that case there is aptly expressed the views which are determinative of the point in question against appellants in the case at bar. The court says: "The agreement between the plaintiff and the defendants, to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between creditors upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction."¹

Judgment and order affirmed.

DE HAVEN, J., and SHARPSTEIN, J., concurred.

¹ The remainder of the opinion, relating to another point, is omitted.

² *Ex parte Milner*, 15 Q. B. D. 605; *Bank of Commerce v. Hoeber*, 88 Mo. 37; *Solinger v. Earle*, 82 N. Y. 393, *acc.* See also *Coleman v. Waller*, 3 Y. & J. 212; *Knight v. Hunt*, 5 Bing. 432; *Brown v. Nealley*, 161 Mass. 1. Compare *Continental Nat. Bank v. McGeoch*, 92 Wis. 286. If the debtor is ignorant of the advantage given by a third person to one creditor, other creditors cannot avoid the composition. *Martin v. Adams*, 81 Hun. 9. See also *Ex parte Milner*, 15 Q. B. D. 605; *Bank of Commerce v. Hoeber*, 88 Mo. 37, 44.

THE HANOVER NATIONAL BANK, APPELLANT, v. SARAH F. BLAKE, RESPONDENT.

NEW YORK COURT OF APPEALS, MARCH 2-JUNE 5, 1894.

[Reported in 142 New York, 404.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 21, 1892, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

The action is brought by the payee of a promissory note against the indorser. The facts were not in dispute and were stated by the General Term, as follows:

Frederick D. Blake and Charles Waterman were partners engaged in the dry goods business under the firm name of F. D. Blake & Co. They were indebted to various creditors, including the plaintiff, and, becoming insolvent, executed a general assignment of all their property to James H. Thorp on the 24th day of April, 1888. On the 4th of June, 1888, the creditors of F. D. Blake & Co. signed a composition agreement by which they agreed to take 40 per cent of their respective claims, to be paid by four notes made by the members of the firm, each for 10 per cent of the claim, two payable in six and twelve months, and two in eighteen and twenty-four months, the latter two indorsed by Sarah F. Blake.

The Hanover Bank, desiring to have the security of Mrs. Blake upon all the notes, asked that she indorse the first two as well as the last two, which she did. This was not known to the other creditors, and was a security additional to that provided by the terms of the composition agreement.

The note in suit is the *third* of the series, payable in eighteen months, and properly indorsed by Mrs. Blake, in accordance with the composition agreement.

At the trial both parties moved for judgment; which the court directed for the defendant. At the General Term that judgment was affirmed and the plaintiff has again appealed to this court.

Thomas S. Moore, for appellant.

C. Bainbridge Smith, for respondent.

GRAY, J. In the General Term opinion the question of law was stated thus: "Did the secret agreement, by which Mrs. Blake indorsed the first two notes, invalidate the whole composition agreement, so that notes given in pursuance of its term are not enforceable by the plaintiff?" The learned justices, finding no controlling authority in this State, determined the question adversely to the plaintiff and upon the ground, in substance, that, as the agreement was fraudulent, the

fraud permeated and vitiated the whole composition agreement and disabled the creditor from recovering anything under it. In this view we are not able to agree with them. It may be true that there was no decision in the courts of this State in its features so precisely in point, as to compel adherence to its authority, and it is true that the view of the General Term has support in decisions of English courts. I think, however, that in our State there are expressions of opinion by eminent judges of this court and by a former very distinguished judge of the Superior Court of the city of New York, which rather commit us to a contrary view, and which should commend themselves to us as furnishing a wise and more politic rule, in these cases of compositions by an insolvent debtor with his creditors. The general principle has been long settled in England and here that a secret agreement, which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality; and that equality would be destroyed, if the secret agreement were given effect. In *Leicester v. Rose* (4 East, 372 at p. 381), LORD ELLENBOROUGH observed that the principle of all the cases was "that where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." In *Russell v. Rogers* (10 Wend. 474-479), JUSTICE (afterwards CHIEF JUSTICE) NELSON said: "So scrupulous are courts in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown to the other creditors, is void and inoperative." It is in the extent of the operation of the principle, which was thus early asserted, that we will find the divergence of judicial opinions between English judges and those of this State. It is curious to observe that though *Leicester v. Rose* was relied upon as the basis of authority for their conclusions, the application of the doctrine of that case has been different in each country. *Leicester v. Rose* was decided in 1803. Its facts were that several creditors of the insolvent refused to sign, unless collateral security, which was to be given for the first two instalments of the composition payment, should also be given for the last two. The defendant agreed to procure this additional security, and, not having done so, the action was brought to enforce his agreement. LORD ELLENBOROUGH stated the question to be, whether any legal effect could be given to such an agreement, which gave to some creditors a better security than to others, and he held that it could not, as it was a fraud upon the rest of the creditors. The case of *Howden v. Haigh* (11 Ad. & Ellis, 1033) was decided in 1840 and was a suit upon composition notes. By a secret agreement between

the plaintiff and defendant that the latter should indorse to him a bill, accepted by a third party, in order to give him a preference beyond the other creditors, the former had been induced to sign the composition deed. It was held that he could not recover. LORD DENMAN, relying upon *Leicester v. Rose* and *Knight v. Hunt*, held that every part of the transaction was avoided by reason of the deceit upon the other creditors. LITLEDALE, J., while agreeing with him that the fraud extended over the whole, remarked, rather significantly, "it is possible that the plaintiff may be entitled to sue for the original debt." The case of *Knight v. Hunt* (5 Bingham, 432), referred to by LORD DENMAN, if we are to regard the language of the opinion, did not expressly decide that the whole transaction was avoided. In that case the plaintiff had refused to accede to a composition of ten shillings in the pound, until a brother of the debtor agreed to supply him with coals to an amount in value equal to half the debt. The coals were furnished; but the notes remained unpaid and the plaintiff brought this suit upon them. BEST, C. J., stated the principle that the judgment of the creditors is influenced by the supposition that all are to suffer in the same proportion, and briefly concluded with the remark: "Here the plaintiff has had his ten shillings in the pound in coal, and he cannot have it again in money." In *Mallalieu v. Hodgson* (16 Ad. & Ellis N. S. 689), decided in 1851, ERLE, J., held that "where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void, not only can he take no advantage from it, but he is also to lose the benefit of the composition." In this ruling he relied upon *Leicester v. Rose* and *Howden v. Haigh*. The plaintiff there was seeking to recover for the balance of his original debt, after allowing for the amount of the composition and the value of a preference. It was his claim that the composition deed had not released the debt to him; because he had been induced to believe that he alone was preferred, whereas some other creditors had also been secretly preferred. It will be observed that in *Mallalieu v. Hodgson* it was unnecessary to decide whether the plaintiff had lost the benefit of the composition. The question was whether the plaintiff could defeat the effect of the composition agreement, by the plea that he had been deceived into supposing that he was the only creditor secretly preferred. As an expression of judicial opinion, it must, however, be accorded its weight as evidencing the continuance of the authority of *Howden v. Haigh*. That case furnishes the sole basis of authority, on which subsequent decisions and text-writers have rested the doctrine that the fraud in the secret agreement with the creditor so vitiates the whole transaction of composition as to disable him from recovering even the amount of the composition. (Leake on Contracts, 768; Chitty on Contracts, 694; Wald's Pollock on Contracts, 239.) I say the sole authority, because *Leicester v. Rose* did not go so far as that, and *Howden v. Haigh* was an extension of the principle, which

was supposed to be justified by LORD ELLENBOROUGH's decision in the former case. The doctrine of *Howden v. Haigh*, it may be observed, did not go wholly unquestioned in England; as may be inferred from the remarks of LITLEDALE, J., in that case, which I have quoted, and of BARON ALDERSON in *Davidson v. M'Gregor* (8 M. & W. at p. 763), who said he was "alarmed at the extent to which that decision goes."

In this State, with the case of *Leicester v. Rose* before him, JUDGE DUER, in *Breck v. Cole* (4 Sandf. 79), formed quite a different conclusion, as to the extent of the effect of a secret agreement, which attempts to secure to a creditor an advantage over the other creditors. *Breck v. Cole* was an action upon a promissory note, secretly given to the plaintiff, in addition to the composition notes, as an inducement to him to agree to the composition. JUDGE DUER in his opinion comments upon the fraudulent nature of the agreement in its effect upon the other creditors; observing that "it is in all cases the concealment of a fact, which it was material for them to know and the knowledge of which might have prevented them from assenting to the composition. . . . Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum, or the security, which the deed stipulates to be paid and given, and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." The learned judge then adverts to the violation of the equality among creditors worked by secretly giving additional security, and states this conclusion: "Hence, either the composition deed itself . . . or the private agreement, which seeks to evade and, if valid, would defeat it, must be set aside, and sound policy and the principles of good faith require that the latter course should be followed. It is perfectly just that every creditor who signs a composition deed, should be estopped from setting up any private agreement repugnant to its terms, or inconsistent with its intention and spirit and . . . every private agreement . . . is of this character and consequently, . . . every security, which is the fruit of such an agreement is illegal and void." He reviews the early decisions in the courts of England and of this State, and concludes that "it is the clear and inevitable result of the decisions that where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void as a fraud upon the creditors from whom it is concealed." The importance of this expression of judicial opinion should not, in my judgment, be underestimated. It was delivered by one of the most eminent judges in this State and was concurred in by his associates, JUDGES MASON and CAMPBELL. It does not appear from the opinion that *Howden v. Haigh* was before him; although it had been decided ten years before. But whether his attention was called to it or not, the learned judge's opinion was formed after considering the same early English cases as were

considered by LORD DENMAN in *Howden v. Haigh* and by JUSTICE ERLE in *Mallalieu v. Hodgson*. JUDGE DUER limited the effect of the fraudulent secret agreement to the nullification of any rights or advantages attempted to be gained under it, and regarded it as something quite separable from the composition agreement itself. From all the early cases in England and in this State the inference from the decisions is, not that the composition agreement is avoided, but, as JUSTICE NELSON stated it in *Russell v. Rogers*, "the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, . . . is void and inoperative." So in *Fellows v. Stevens* (24 Wend. 294), JUSTICE COWEN held that the law would set aside "all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors." It is the secret agreement itself which is fraudulent and void. (*Bliss v. Matteson*, 45 N. Y. 22; *Harloe v. Foster*, 53 id. 385.) And that is all that I think *Leicester v. Rose* decided. *White v. Kuntz* (107 N. Y. 518) is one of the latest cases in which this court has considered the effect of composition agreements. In that case the plaintiff had signed a composition agreement, by which he agreed with other creditors of the debtors to accept one-third of the indebtedness due them in four notes, to be indorsed by the father of the debtors. To induce the plaintiff to sign this agreement, Kuntz, the father of the debtors, secretly agreed to purchase of him the composition notes within a specified time and to pay \$10,000, the composition notes aggregating only about \$6,000. This secret agreement Kuntz refused to perform; alleging that it was null and void. Thereupon plaintiff brought an action, alleging these facts in his complaint and, also, that several other creditors had been induced to sign by a secret agreement to pay them a larger percentage than the one-third provided for in the composition agreement and, upon the ground that that agreement was void as to him, demanded its cancellation and that of the notes delivered under it, and a judgment against the debtors for the amount of the original indebtedness. Demurrer to the complaint was sustained below and in this court the judgment was sustained. It was held that the agreement between plaintiff and Kuntz, the debtors' father, was fraudulent and could not be enforced, and that the composition agreement as to all the innocent parties was avoided. As the plaintiff was not an innocent party; but had, himself, taken a fraudulent advantage, he could not set up the fraud of the creditors. The opinion discusses what were his rights. It was said that he had not forfeited all claims upon his debtors; that "he must have either the composition notes, or his original notes;" that he could not avoid the composition agreement as to himself and enforce his original notes for their full amount, as that would unjustly result in an advantage over the other creditors and "he should be held to the composition." "His only remedy," it was said, "against the defendants is upon the composition notes."

JUDGE EARL, in delivering the opinion in *White v. Kuntz*, cited the English case of *Mallalieu v. Hodgson* (*supra*) as an authority in point; but that he did not adopt the opinion in all its expressions is evident; for he held that there was "no ground upon which he" (the creditor in the case before him) "can be deprived of all remedy."

It is very plain from the opinion in *White v. Kuntz* that it is the secret agreement, by which the creditor receives an undue advantage, which is deemed to be avoided. It was so considered, again, by JUDGE ANDREWS, in *Meyer v. Blair* (109 N. Y. 600), who, referring to *White v. Kuntz*, as authority for the statement that a collateral agreement is void in composition cases, which secures to one creditor an advantage over others, said, "the court refuses to enforce the secret bargain and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept." In *Solinger v. Earle* (82 N. Y. 393) the facts were, that a third party had given his note for a portion of the insolvent's debt to the defendants, to induce them to agree to the composition. Having paid the note to a transferee thereof, he brought an action to recover back from the defendants the money so paid. It was held that the action could not be maintained; for, though the transaction was a fraud upon the other creditors, the parties were *in pari delicto*. JUDGE ANDREWS, remarking that fair dealing condemned such a transaction, said: "If the defendants here were plaintiffs, seeking to enforce the note, it is clear that they could not recover." Inasmuch as the note sued upon was for an additional amount, beyond the amount of the composition agreement, the remark of the learned judge was in line with all the authorities. He held the secret agreement was void and could not have been enforced. The case is in no wise in conflict with *White v. Kuntz* or *Meyer v. Blair*.

If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt; a view which LITTLEDALE, J., regarded as probable in *Howden v. Haigh*.

It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement for any purpose. We assert a wholesome rule and one which works a just result, if we hold that the secret and fraudulent agreement itself is illegal, and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition; though it has support in some of the English cases referred to. It seems to me the case falls easily within the

rule, which permits a severance of the illegal from the legal part of the covenant (*Pickering v. Ilfracombe R'way Co.*, L. R. 3 C. P. 235, 250; *United States v. Bradley*, 10 Peters, 343-360.)

In *Mallan v. May* (11 M. & W. 653) the plaintiffs, who were surgeon dentists, agreed to take the defendant as an assistant, and to instruct him for a term of years, and he agreed at the expiration of that term not to practise his profession "in London or any of the towns in, or places in, England or Scotland, where the plaintiffs might have been practising." It was held that the covenant as to not practising in London was valid, and that not to practise elsewhere was illegal; but that the valid part was not affected by the illegality of the other part. Here the agreement with other creditors for a composition was lawful and valid (unless they should elect to rescind it upon the discovery of the secret agreement, an element not present); but the agreement for, and the giving of, additional security was unlawful and void. Is there any reason why the bad may not be rejected and the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiff's original demand; or that it shall fall and leave the plaintiff at liberty to recover the original debt, I am for upholding it, and I fail to see why the legal part of the transactions had with it cannot be severed from the illegal part. We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory, they may not so elect, and may rely that the creditor, secretly seeking to obtain some promise of advantage over them, will be prevented from enforcing it and from gaining anything by his fraud. Its illegality is a perfect defence in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation, which, from its inception, was unlawful and which the law annuls. (*Bliss v. Matteson*, 45 N. Y. 22.) It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain, there would be an inducement to an unscrupulous creditor to commit a fraud; for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent that may be true; but, on the other hand, it may be suggested that, if it were the rule, the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement and

thus, by trick and device, to leave them wholly remediless, disabled to recover the amount of the composition and disabled from pursuing the original debt which the composition agreement released. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement. The conclusion reached is the result of a careful examination of the authorities and the doctrine they teach, and it is in accord with a wiser policy. It must not be forgotten that the defendant's contract of indorsement is within the terms of the composition agreement, with respect to the note in suit. We know nothing of the fate of the earlier notes; the indorsement upon which by defendant was secretly and fraudulently procured to be added. She had a perfect defence to the enforcement of her contract. We are only concerned now with the question of whether the plaintiff shall have the amount of the composition, notwithstanding it may have been agreed secretly that it should have some better security for the payment of some of the composition instalments. This question, for the reasons stated, should be answered in the affirmative, and, therefore, the judgments below should be reversed and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS, Ch. J., and PECKHAM, J., dissenting.

Judgments reversed.

N. G. GIBBS AND ANOTHER v. L. C. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 21-26, 1874.

[Reported in 115 *Massachusetts*, 592.]

CONTRACT to recover for the breach of the following written agreement signed by the parties thereto: "An agreement made this day between N. G. Gibbs, S. A. Cornell, L. C. Smith, and J. C. Kingsley, that the said Gibbs and Cornell will not bid or influence any one to bid, and will not accept the contract of any one else; and further, the said Kingsley agrees to pay the said Gibbs and Cornell the sum of five hundred dollars if he gets the contract of the jail for the coming three years; and further, the said Smith agrees to pay said Gibbs and Cornell eight hundred dollars if he accepts the contract of the jail for the next three years and runs it."

At the trial in the Superior Court, before Wilkinson, J., the plaintiffs offered to prove that the agreement related to the letting upon bids advertised for by the overseers of the house of correction of Hampden County, for the services and labor for three years, of the inmates of the house of correction of the county; that they fully performed their agreement, and that the defendant accepted the contract of the jail as speci-

fled in the agreement and runs it, and although requested by plaintiffs to pay them the sum of eight hundred dollars, according to the terms of said agreement, refuses so to do; that the plaintiffs, by reason of favoritism, would not have obtained the contract if they had made bids therefor; and that the county was, therefore, in no manner injured by the agreement of said parties.

Upon these offers the presiding judge ruled that the plaintiffs could not maintain their action, on the ground that the agreement was against public policy and void, and directed a verdict for the defendant, and the plaintiffs alleged exceptions.

E. B. Gillett and *H. B. Stevens*, for the plaintiffs.

G. M. Stearns and *M. P. Knowlton*, for the defendant.

DEVENS, J. An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced;¹ but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and therefore illegal.² *Phippen v. Stickney*, 3 Met. 384, 387; 1 Story Eq. Jur. § 293; Story Sales, § 484.

The contract in the present case is manifestly of the latter class. The labor of the inmates of the house of correction was to be sold at

¹ *Kearney v. Taylor*, 15 How. 494, 519; *Jenkins v. Fink*, 30 Cal. 586; *Switzer v. Skiles*, 8 Ill. 529; *Hunt v. Elliott*, 80 Ind. 245; *Smith v. Ullman*, 58 Md. 183; *Phippen v. Stickney*, 3 Met. 384; *Stillwell v. Glasscock*, 91 Mo. 658; *Murphy v. De France*, 105 Mo. 53; *Whalen v. Brennan*, 34 Neb. 129; *Gulick v. Webb*, 41 Neb. 706; *Olson v. Lamb*, 56 Neb. 104; *Bellows v. Russell*, 20 N. H. 427; *Huntington v. Bardwell*, 46 N. H. 492; *National Bank v. Sprague*, 20 N. J. Eq. 159, 168; *De Baun v. Brand*, 61 N. J. L. 624; *Marsh v. Russell*, 66 N. Y. 228; *Marie v. Garrison*, 83 N. Y. 14; *Smith v. Greenlee*, 2 Dev. L. 126; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Breslin v. Brown*, 24 Ohio St. 565; *Smull v. Jones*, 6 W. & S. 122; *Maffet v. Ijams*, 103 Pa. 266; *McMinn's Legatees v. Phipps*, 3 Sneed, 196; *James v. Fulcrod*, 5 Tex. 512; *Flanders v. Wood*, 83 Tex. 277; *Dailey v. Hollis*, 27 Tex. Civ. App. 570; *Barnes v. Morrison*, 97 Va. 372, acc. Compare *Woodruff v. Berry*, 40 Ark. 251; *Marshalltown Stone Co. v. Des Moines Brick Co.*, 114 Iowa, 574.

² *Hyer v. Richmond Traction Co.*, 80 Fed. Rep. (C. C. A.) 839, 168 U. S. 471; *McMullen v. Hoffman*, 174 U. S. 639; *Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489; *Swan v. Chorpensing*, 20 Cal. 182; *Ray v. Mackin*, 100 Ill. 246; *Devine v. Harkness*, 117 Ill. 145; *Conway v. Garden City Co.*, 190 Ill. 89; *Hunter v. Pfeiffer*, 108 Ind. 197; *Clark v. Stanhope*, 109 Ky. 521; *Gardiner v. Morse*, 25 Me. 140; *Weld v. Lancaster*, 56 Me. 453; *Hanna v. Fife*, 27 Mich. 172; *Boyle v. Adams*, 50 Minn. 255; *Wooton v. Hinkle*, 20 Mo. 290; *Miltenerberger v. Morrison*, 39 Mo. 71; *Goble v. O'Connor*, 43 Neb. 49; *McClelland v. Citizens' Bank*, 60 Neb. 90; *Gulick v. Ward*, 5 Halst. 87; *Brooks v. Cooper*, 50 N. J. Eq. 761; *Kenny v. Lembeck*, 53 N. J. Eq. 20; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *People v. Stephens*, 71 N. Y. 527; *Hopkins v. Ensign*, 122 N. Y. 144; *Baird v. Sheehan*, 166 N. Y. 631; *Coverly v. Terminal Warehouse Co.*, 83 N. Y. Supp. (App. Div.) 369; *Ingram v. Ingram*, 4 Jones L. 188; *King v. Winants*, 71 N. C. 469; *Kine v. Turner*, 27 Oreg. 356; *Saxton v. Seiberling*, 48 Ohio St. 554, 563; *Barton v. Benson*, 126 Pa. 431; *Hay's Estate*, 159 Pa. 381; *Dudley v. Odom*, 5

Handwritten: *See Jewett v. Butler, 113 Mass. 133.*

auction. The plaintiffs contracted with the defendant not to bid for it if the defendant would pay them a certain sum if he obtained it. The only consideration for the defendant's promise was that the plaintiffs should abstain from bidding. Competition would thus be destroyed so far as these parties were concerned, and the labor might thus be obtained at a rate lower than its fair market value. The contract thus made being against public policy, no action can be maintained upon it by the parties thereto. *Fuller v. Dame*, 18 Pick. 472; *Rice v. Wood*, 113 Mass. 133.

Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested not by its results, but by its objects as shown by its terms.

Exceptions overruled.

C. F. JEWETT PUBLISHING COMPANY v. BUTLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 19, 1893.

[Reported in 159 Massachusetts, 517.]

THIS was an action to recover for breach of an agreement to allow the plaintiff corporation to publish "Butler's Book." In the Supreme Judicial Court, Holmes, J., found that if the contract relied on by the plaintiff was valid, the plaintiff was entitled to recover \$2,500 with interest, and reported the case to the full court. The material facts are in the opinion.¹

E. C. Bumpus, S. J. Elder, and W. C. Wait, for the plaintiff.

J. Lowell and E. M. Johnson, for the defendant.

MORTON, J. The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in said work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suits." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used as quoted above import one as matter of law? We think not. The parties were contracting respecting a book which was

S. C. 131; *Wilson v. Wall*, 99 Va. 353, 356; *Ralphsnyder v. Shaw*, 45 W. Va. 680, acc. See also *Fenner v. Tucker*, 6 R. I. 551; *Herndon v. Gibson*, 38 S. C. 357; 20 L. R. A. 545, n. Compare *Breslin v. Brown*, 24 Ohio St. 565. The English authorities, however, seem opposed to the American decisions. *Galton v. Emuss*, 1 Coll. Ch. 243; *Re Carew's Estate*, 26 Beav. 187; *Heffer v. Martyn*, 36 L. J. Ch. 372; *Chattock v. Muller*, 8 Ch. D. 177. Compare *Levi v. Levi*, 6 C. & P. 239.

¹ The statement of the case is abbreviated.

not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libellous matter, as was the case, for instance, in *Shackell v. Rosier*, 2 Bing. N. C. 634, referred to by the defendant. (At the same time it was not impossible that in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libellous.) In such a case it would be no more unlawful for the parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book, than it would be for a patentee to agree with his licensee that he would protect him against all costs and damages to which he might be subjected in consequence of using the patent to which the license applied. (The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libellous matter.) There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that though there was no intention to write or publish, nor any contemplation of writing or publishing libellous matter on the part of the author or publisher, it might turn out after the book was published that it did contain libellous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author.

Moreover, it was possible in this case that the book might not contain libellous matter, although libel suits against the publisher might grow out of it. It would be hard to say in such event that the publisher who might have published the book without any libellous purpose, and in the full belief that it contained nothing libellous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. (In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libellous matter; or that the author proposed, with the knowledge and acquiescence of the publisher, to write libellous matter, or that the contract on its face provided for or promoted an illegal act.) We do not think the clause in question is fairly susceptible of either construction. *Fletcher v. Harot*, Hutton, 55; *s. c. sub nom. Battersey's case*, Winch, 48; *Betts v. Gibbons*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Cannan v. Bryce*, 3 B. & Ald. 179; *Graves v. Johnson*, 156 Mass. 211.

The defendant contends, in the next place, that he was justified in his refusal to go on with the contract, because of his doubts as to the

solvency of the plaintiff corporation, and because of the disgrace attaching to its name in consequence of the conduct of Jewett.

The first ground thus taken would seem to be disposed of by the recent case of *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109, and need not, therefore, be further considered.

As to the second ground, it is to be observed that the contract was not made with Jewett personally, but with the corporation which bore his name. Moreover, Jewett has fled, and it fairly may be presumed that his place as president and manager has been filled by the election of another person, so that the defendant cannot and will not be obliged to come into further association with him. It is well known that corporations are frequently organized which bear as part of their corporate name the name of some individual. (The contention of the defendant would require us to hold that in all such cases a party making a contract with such a corporation would be justified in refusing to go on with it, if the person whose name the corporation bore committed an act rendering him liable to punishment as a criminal, or bringing him into disgrace and rendering further association with him unprofitable and injurious to the other party to the contract.) But a corporation does not, in such a case, impliedly guarantee, as an element of the contract entered into with it, that the person whose name it bears shall continue to be a reputable member of society. The corporation is distinct from the person whose name it bears. Its interests and those of its stockholders in contracts made by it with other parties, are not to be affected by the disgraceful or criminal conduct of the person whose name it bears, and for which it is in no way responsible. A majority of the court think the entry should be, judgment for plaintiff for \$2,500, and interest from June 9, 1890, and it is *So ordered.*

LATHROP, J. I am unable to concur in the opinion of the majority of the court, that the contract sought to be enforced is a valid contract. The contract provides for the publication of a work to contain the author's autobiography, "or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs." It is in reference to a work of this character that the defendant agrees to do three things: First, "to accept full responsibility of all matters contained in said work." Secondly, "to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work." Thirdly, "to pay all costs and damages arising from such suits." The obligation of the defendant is not limited to paying legal expenses, but includes costs and damages recovered against the publisher "for publishing any statement contained in said work." While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should so be construed. What the

parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libellous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion it could not, and this view is sustained by the authorities. *Shackell v. Rosier*, 2 Bing. N. C. 634; *Colburn v. Patmore*, 1 C. M. & R. 73; *Gale v. Leckie*, 2 Stark. 107; *Clay v. Yates*, 1 H. & N. 73; *Arnold v. Clifford*, 2 Sumn. 238;¹ *Odgers Libel and Slander*, 2d ed. 8. See also *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, 12; *Babcock v. Terry*, 97 Mass. 482. It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. *Robinson v. Green*, 3 Met. 159, 161; *Perkins v. Cummings*, 2 Gray, 258; *Woodruff v. Wentworth*, 133 Mass. 309; *Bishop v. Palmer*, 146 Mass. 469; *Lound v. Grimwade*, 39 Ch. D. 605, 618.²

DENNIS MALONEY, RESPONDENT, v. SAMUEL NELSON,
APPELLANT.

NEW YORK SUPREME COURT, APPELLATE DIVISION, DECEMBER TERM, 1896.

[Reported in 12 Appellate Division, New York Supreme Court, 545.]

RUMSEY, J.³ The action was brought against the appellant with other defendants to foreclose a mortgage, and upon the trial the plaintiff succeeded. From the judgment entered after that trial, the defendant Nelson, who gave the mortgage, appeals. For the purpose of sustaining his contention upon the appeal he makes several objections, which will be considered in their order.

¹ *Lea v. Collins*, 4 Sneed, 393; *Atkins v. Johnson*, 43 Vt. 78, *acc.*

² A promise to indemnify one from the consequences of doing an act which is necessarily illegal is unenforceable. *Greenhood on Public Policy*, 210 *et seq.* But where the legality of the act depends on extrinsic facts unknown to the promisee, enforcement of a promise to indemnify him from the consequences of doing the act is not opposed to public policy. *Arundel v. Gardiner*, Cro. Jac. 652; *Fletcher v. Harcot*, Winch, 48; *Merriweather v. Nixon*, 8 T. R. 186; *Betts v. Gibbons*, 2 A. & E. 57; *Elliston v. Berryman*, 15 Q. B. 205; *Moore v. Appleton*, 26 Ala. 633; *Stark v. Raney*, 18 Cal. 622; *Lerch v. Gallup*, 67 Cal. 595; *Marcy v. Crawford*, 16 Conn. 549; *Higgins v. Russo*, 72 Conn. 238; *Wolfe v. McClure*, 79 Ill. 564; *Marsh v. Gold*, 2 Pick. 284; *Train v. Gold*, 5 Pick. 379; *Avery v. Halsey*, 14 Pick. 174; *Shotwell v. Hamblin*, 23 Miss. 156; *Forinquet v. Tegarden*, 24 Miss. 96; *Moore v. Allen*, 25 Miss. 363; *McCartney v. Shepard*, 21 Mo. 573; *Harrington's Adm. v. Crawford*, 136 Mo. 467, 472; *Allaire v. Ouland*, 2 Johns. Cas. 54; *Coventry v. Barton*, 17 Johns. 142; *Trustees v. Galatian*, 4 Cow. 346; *Chamberlain v. Beller*, 18 N. Y. 115; *Ives v. Jones*, 3 Ired. 538; *Miller v. Rhodes*, 20 Ohio St. 494; *Mays v. Joseph*, 34 Ohio St. 22; *Comm. v. Vandyke*, 57 Pa. 34; *Jamison v. Calhoun*, 2 Speer, 19; *Davis v. Arledge*, 3 Hill, 170; *Hunter v. Agee*, 5 Humph. 57; *Ballard v. Pope*, 3 U. C. Q. B. 317; *Robertson v. Broadfoot*, 11 U. C. Q. B. 407. See also *Vandiver v. Pollak*, 97 Ala. 467, 107 Ala. 547; *Union Stave Co. v. Smith*, 116 Ala. 416; *Griffiths v. Hardenbergh*, 41 N. Y. 464.

³ A portion of the opinion not relating to the question of public policy is omitted.

In the first place he says that the contract was void as against public policy. The facts are that, just before the giving of the bond and mortgage, one O'Brien had been arrested for a felony and held to bail in the sum of \$10,000. The defendant Nelson intended to go upon his bond, but it was necessary to procure another surety, and by way of inducing him to do so, Nelson offered to give him this bond and mortgage as indemnity for any liability which he might incur, whereupon he became one of the bail for O'Brien, and then this bond and mortgage was given by Nelson. The indemnity bond recited that Maloney had signed the bail bond for O'Brien as one surety in the penal sum of \$10,000, with the usual conditions for the appearance of O'Brien, and then continued: "Now, therefore, if there shall be no default in said bond or recognizance so signed by said Maloney, then this obligation to be void; otherwise to remain in full force and virtue." The bond and mortgage, therefore, as it will be seen, were made by one surety upon the undertaking of bail to indemnify the other surety against the failure of the principal to appear.

The claim of the defendant is that such a contract is void as against public policy. His contention is substantially that the object for which bail is required is to assure the appearance of the prisoner to answer to the charge against him; that by accepting the custody of the prisoner he is transferred from the State to the sureties upon the recognizance, who, because of the pecuniary liability resulting from his escape, have a direct personal interest in securing his appearance; that this personal interest is diminished or taken away if they are permitted to indemnify themselves against the loss resulting from his failure to appear, and, therefore, such an indemnity impairs the effect of the contract which they have made. A contract is said not to be enforceable, because it is against public policy, either because it is directly in violation of some provisions of law, or because the courts can see that its necessary result is to undermine public morals; to endanger the public health or public safety; to prevent competition at judicial sales, or to improperly influence legislation or the action of public officers for the administration of justice, or to nullify the policy of the law. Unless something of this kind can be necessarily predicated of a contract it does not interfere with the broad liberty which every person has to make such agreement as he sees fit, and a contract thus made will be enforced by the courts. The question whether such a contract as this one is void has been presented to the courts of England in several reported cases, but in only one of them was it a necessary point to be decided in the case. In the case of *Jones v. Orchard*, 16 C. B. 614, the court consider the question somewhat, but leave it undecided, saying simply that while it was inclined to consider the point well taken, it was not necessary to come to a decision upon it. In *Cripps v. Hartnoll*, 4 B. & S. [Q. B.] 414, the action was upon a contract of a third person to indemnify the surety upon a bail bond. The question decided was simply that such a contract was not void by the

Statute of Frauds, and the plaintiff was permitted to recover upon the contract without any reference to the question whether it was void as against public policy. In *Herman v. Jeuchner*, 15 Q. B. Div. 561, the plaintiff had been required to give a bond in the penalty of fifty pounds sterling, with a surety, for his good behavior for two years. In order to induce defendant to give security for him, plaintiff deposited with the defendant the penalty of the bond. He afterwards sued to recover the penalty again, and the defense was that the agreement was void as against public policy, and for that reason the court would not aid either of the parties and so permit the plaintiff to recover the money which he had deposited in part performance of the illegal contract. The court adopted this view of the case and refused to permit the plaintiff to recover. The ground upon which the case was decided seems to be that the object of the law in requiring a surety upon a recognizance was to obtain the personal responsibility of the surety, and to require him to exercise it at the peril of pecuniary loss if he did not, and that his obtaining an indemnity removed the inducement for his personal vigilance and, therefore, deprived the State of the security which it was intended to have for the performance of the law by the principal.¹

In this country the point has been taken in several cases, but in none of them does it seem to have been decided or even necessary to the decision of the case. In *United States v. Simmons*, 47 Fed. Rep. 577, the judge refused to approve of a bail bond, where it appeared that the sureties had been indemnified by the accused and others, for the reason that such a contract of indemnity was illegal, giving substantially the same reason as that suggested above.

In *United States v. Ryder*, 110 U. S. 729, the question was discussed but not decided, because a decision upon that point was not necessary. It was, however, suggested there that a contract of indemnity by the principal to the surety was illegal. In *Anderson v. Spence*, 72 Ind. 315, the only point decided was that a contract of indemnity, made by a party other than the accused, was not within the Statute of Frauds, and, therefore, that a parol contract was valid.

The question seems to have been presented in *Simpson v. Roberts*, 35 Ga. 180, and it was decided there that the contract was valid.

No decision upon the subject is to be found in the courts of this State. In view of the fact that contracts for the indemnity of sureties upon bail bonds have been frequently enforced in the courts, the fact that their validity has not been successfully attacked is of itself strong evidence that they have been presumed to be legal. In fact, there is no case holding that a contract made by a third party to indemnify a surety upon a recognizance is illegal, but all such contracts have been sustained. The only case in which there has been a suggestion that such contracts are invalid is where they have been made by the principal himself. It is not perceived that there is any valid distinction in

¹ *Consolidated Finance Co. v. Musgrave*, [1900] 1 Ch. 37, *acc.* See also *Wilson v. Strugnell*, 7 Q. B. D. 548.

principle between a contract made by the accused and one made by somebody else for his benefit, but, nevertheless, that distinction seems to exist in the books, and to result in contracts on the one hand being held valid, and on the other hand being disapproved.

In this State, however, it is quite clear that there is no public policy which condemns such contracts. The Legislature has regulated, by statute, the giving of bail in criminal cases, and if the sureties were not to be permitted to indemnify themselves, it is quite probable that the Legislature would have said so. Not only have they not said so, but it is not necessarily to be inferred from the present condition of the law, that the contract of bail need not depend upon the personal responsibility of the surety, because the Legislature permits bail to be given not only by a recognizance signed by sureties in the old manner, but also by the deposit of money by the accused. Such a mode of giving bail necessarily does away with any idea of personal liability, and it is fairly to be inferred that such personal liability was not regarded by the Legislature as of such importance that it was to be insisted upon in all cases. It is not, therefore, necessarily a part of the policy of the law that such liability must exist, and a contract which relieves the bail from that liability is not necessarily illegal.

VAN BRUNT, P. J., WILLIAMS, PATTERSON, and INGRAHAM, JJ., concurred.

*Judgment affirmed, with costs.*¹

J. N. TILLOCK v. JOHN WEBB.

SUPREME JUDICIAL COURT OF MAINE, 1868.

[Reported in 56 Maine, 100.]

ON exceptions to the ruling of Goddard, J., in the Superior Court.

Assumpsit on a note for \$48, given by the defendant to the plaintiff, dated April 13, 1867. Plea, general issue, with brief statement denying any consideration, and also alleging that the consideration was an unlawful one.

The case was tried by the judge (without the intervention of a jury), whose decision was subject to exceptions in matters of law.

The judge found, as matter of fact, that the defendant, at Bucksport, at half-past four o'clock on one Sunday afternoon in July, 1865, hired a horse and carriage of the plaintiff, who was a stable-keeper, and took from the house where the defendant was living, two young ladies, one of whom had come from church about an hour previous, whither she had walked that day from her home, two or three miles distant; that he drove about one half a mile beyond her house, and while in the

¹ This decision was affirmed by the Court of Appeals, 158 N. Y. 351.

act of turning the horse and carriage for the purpose of going back to leave her at her house, upset and badly injured the buggy, and frightened and more or less thereby injured the horse for stable use; that, after tying together the broken buggy, the defendant undertook to lead the horse back, but the horse got away from him and ran home with the buggy; that the plaintiff had the carriage repaired at an expense of \$60; that the defendant paid the plaintiff \$30, and gave the note in suit for the balance of damages claimed.

The judge ruled that the facts disclosed a sufficient consideration for the note, and that the consideration was lawful. To which ruling the defendant alleged exceptions.

Thos. B. Reed, for the plaintiff.

J. O'Donnell, for the defendant.

APPLETON, C. J. The defendant hired of the plaintiff and his partner a horse and wagon to ride on Sunday. The hiring was not for any purpose of necessity or charity. Being illegal between the parties, it is not made legal because the hirer did a kind act by conveying a young lady home, who had been "to meeting" during the day. The contract, so far as disclosed, was indefinite as to time, distance, and use, and not being for any purpose of necessity or charity, was one which the law will not enforce, nor will it give compensation for its violation. *Way v. Foster*, 1 Allen, 408; *Morton v. Gloster*, 46 Maine, 520.

If the defendant injured the horse and wagon by his careless or negligent driving, the remedy for the bailors would be against him for breach of his duty as bailee,—that is, for a breach of the duties arising from and under the contract of bailment. But, as that contract was against the provisions of the statute, no action could have been maintained upon it.

The only consideration for the note is the liability of the defendant under a contract prohibited by law. But this cannot be regarded as a legal consideration. The rights of the parties remain as if no note had been given. The original contract, being void, was not susceptible of ratification. *Day v. McAllister*, 15 Gray, 433.

In *Morton v. Gloster*, 46 Maine, 520, and in *Woodman v. Hubbard*, 5 Foster, 520, the bailee was guilty of a conversion of the property bailed, and was held liable therefor in trover. Not so here. The defendant is not proved to have kept the horse and wagon longer or to have driven further than he agreed to. He is not shown to have been guilty of any act of conversion.

Exceptions sustained.

KENT, WALTON, DICKERSON, and DANFORTH, JJ., concurred.¹

¹ On the effect of transactions on Sunday, see *Harris*, Sunday Laws; *Ringgold*, Law of Sunday; *Greenhood* on Public Policy, 546 *et seq.*; 26 Am. & Eng. Encyc. of Law (2d ed.).

Handwritten:
Contract made on Sunday
Sunday law is in conflict

GEORGE W. STEWART v. CHARLES H. THAYER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 2-30, 1893.

[Reported in 170 Massachusetts, 560.]

HOLMES, J. This is an action upon an account annexed, for music furnished to the defendant by the plaintiff. The case already has been before this court after a trial on the first count. *Stewart v. Thayer*, 168 Mass. 519. It has been decided that the contract testified to by the plaintiff was entire, and is not to be enforced because a part of the services which it called for were to be rendered on Sunday, and were within the prohibition of Pub. Sts. c. 98, §§ 1, 2. We assume this to be settled, and shall discuss it no further.¹

When the case came on for trial a second time, the plaintiff was allowed to amend his declaration by adding a second count, like the first on an account annexed, but intended seemingly, by some changes of dates, etc., to avoid showing that any of the services rendered were on Sunday, the contract under which they were rendered not being mentioned, of course. It was objected on behalf of the sureties on a bond given to dissolve the attachment in this suit that the amendment was not for the same cause of action, but the amendment was allowed and the sureties excepted.

We assume that the sureties have a *locus standi* to except, even if their rights would be protected sufficiently by leaving it open to them to deny that the cause of action was the same when sued upon their bond. Pub. Sts. c. 167, § 85. *Kellogg v. Kimball*, 142 Mass. 124, 128, 129. But we think it needs no argument or express evidence to show that the new count is for the same cause of action as the old, within the requirements of Pub. Sts. c. 167, §§ 42, 85. *Mann v. Brewer*, 7 Allen, 202. They both claim the same sum for services during the same months of the same year, and for services shown to have to do with music, in the first count by the words "orchestra and music boxes," in the second by the words "leader and music boxes." Even if the finding had not been warranted when the amendment was allowed, it was shown to be correct as soon as the plaintiff offered his evidence. This exception is overruled.

When it came to the evidence, the plaintiff proposed to prove that he rendered the services declared for on secular days, but admitted

¹ It appears from the report in 168 Mass. 519, that the defendant, proprietor of a seaside resort, contracted in 1893 with the plaintiff, leader of a band, for the services of the band during July and August at certain prices for each week of seven days. The plaintiff and the band played during the agreed time. On Sundays there were concerts in the afternoon and evening.

Subsequent to 1893, some additions were made by statute in Massachusetts to the amusements or matters of business which might lawfully be done on Sunday. See Rev. Laws, c. 98, §§ 3, 5.

that on cross-examination his testimony would be the same as at the former trial, which means that it would show the services to have been rendered under a contract which, as we have said, already has been passed upon by this court. Thereupon the court ruled that the action could not be maintained, and the plaintiff excepted.

It was suggested that the defendant was not entitled to bring out what the real contract was, and that it would be taking advantage of his own unlawful act. But when the plaintiff tried to establish a certain contract, namely, a promise expressed by conduct to pay a fair and reasonable price for services rendered on week days, the defendant had a right to show that he did not make that contract, and he might prove it as well by showing that he made a different contract as by showing that he made none. *Phipps v. Mahon*, 141 Mass. 471, 473; *Starratt v. Mullen*, 148 Mass. 570. For this negative purpose it does not matter whether the contract actually made was valid or not. See *Starratt v. Mullen*, 148 Mass. 570; *New York & New England Railroad v. Sanders*, 134 Mass. 53, 55.

It will be noticed that this contract was bad, not because of the time when it was made, but because of its contents. Unless the original contract had been split up, of which there was no pretence, there could be no question of fact whether a valid contract was not made at a later time, such as sometimes has arisen under the Sunday law. Under such circumstances, however illegality should be dealt with, it should be dealt with on evidence of the facts as they were. It would be inelegant, if not worse, to allow the jury to find that the defendant made an actual contract different from that which he really made, by confining them to evidence of only a part of the facts and excluding the rest.¹

¹ In *Collins v. Blantern*, 2 Wilson, 341, 1 Sm. L. C. (10th ed.) 355 (9th Am. ed.), 646, it was decided that even in an action upon a specialty, valid upon its face, facts might be pleaded and proved showing that the specialty was given as part of an illegal transaction. This has been regarded as settled law since that time. See *Greenhood on Public Policy*, 113 *et seq.* and cases cited. In *Irvin v. Irvin*, 169 Pa. 529, however, a distinction was taken. The action was assumpsit on a written contract by which the defendant promised to pay \$6000 to the plaintiff in return for a conveyance and other stated legal considerations. The defendant offered to prove that a further and essential consideration, though not stated, was refraining from contesting proceedings between the parties for a divorce. The Supreme Court held the evidence properly excluded, saying:

"It must be kept in mind, the suit was not on a bond, bill, note or mortgage, expressing a nominal or money consideration, and which was met by an offer to prove the real consideration, as in nearly every reported case in which the question is considered; it was on a contract setting out in detail a full consideration on part of plaintiff for the money defendant was to pay; a consideration which he had received, and for years had been in the enjoyment of and which he did not pretend to deny. But he says to plaintiff, true, the contract, as represented, was made; the purpose of that was not to obtain a divorce, but to free valuable lands of your claim upon them, that the title might be passed, and a favorable sale made; true, you paid the full consideration, and have not received what you were to get; this contract was a good one for me; it was fair, with no taint of illegality; but there was another, a verbal contract, not in writ-

If the plaintiff were to be allowed to recover, the ground would be that, if the defendant saw fit to repudiate the contract actually made, the law would make him pay the reasonable value of the services lawfully rendered and accepted, and that therefore, under the forms of action in use, he would be liable on a fictitious contract implied by law. Such would be the law of this State if the only trouble with the contract was the statute of frauds. *Bacon v. Parker*, 137 Mass. 309, 311. See *Clark v. United States*, 95 U. S. 539, 542, 546. But such is not the law when the contract is unlawful, and the parties making it stood on an equal footing. The plaintiff, having rendered his services in pursuance of an illegal scheme, is not in a position to ask the law to help him by substituting a fiction for a fact. His inability to recover depends upon different reasons from the inability to recover upon a harmless or laudable contract not evidenced by writing. It may be regarded as a punishment which he is not to be allowed to evade simply by changing the form of his count. It is true that the defendant is as bad as the plaintiff, but he is no worse. It would be treating him as worse if he were compelled to pay according to a fiction because the plaintiff would not be allowed to recover according to the fact. Defendants are not estopped to show that the transactions on which they are sought to be held were illegal, in favor of plaintiffs who cannot invoke the estoppel without showing that they were equally in the wrong.

In *Bradley v. Rea*, 103 Mass. 188, language is used which is somewhat opposed to our decision if taken literally, but we doubt if the court intended to decide anything which we are called on to overrule. The earlier decision of *Ladd v. Rogers*, 11 Allen, 209, sustains our view; and in *Cranson v. Goss*, 107 Mass. 439, 441, Gray, J., says: "If a chattel has been sold and delivered on the Lord's day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because the agreement is illegal; not the value, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied." See also *Dodson v. Harris*, 10 Ala. 566, 569; *Troewert v. Decker*, 51 Wis. 46; *Simpson v. Nicholls*, 3 M. & W. 240, and 5 M. & W. 702, n.; *Thompson v. Williams*, 58 N. H. 248. If this is true as to property

ing, which is illegal, made by our attorneys, by which you were to get a divorce; that avoids the legal contract, and you cannot recover. This was the attitude in which defendant stood, when the offers of testimony were made. Clearly, under the whole testimony, that of plaintiff, which was heard, and that of defendant, which was offered, the integrity of the established written contract could not be affected by what, if true, was a collateral undertaking to do an unlawful act. The written contract did not, as in *Collins v. Blantern*, rest on a vicious consideration, which struck at the contract itself, so that it never had a legal entity. It rested on a perfectly good consideration, wholly independent of the merely collateral promise. No verdict against it, on such evidence, ought to have been or could have been sustained."

See also *Harvey v. Tama Co.*, 53 Ia. 228.

received under an illegal contract and kept when it might be returned, *a fortiori* it is true as to services accepted which cannot be returned. See Keener, Quasi-Contracts, 265.

*Exceptions overruled.*¹

ALICE NOICE v. A. D. BROWN.

NEW JERSEY SUPREME COURT, FEBRUARY TERM, 1876.

[Reported in 38 *New Jersey Law*, 228.]

BEASLEY, C. J. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. These counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I cannot see the faintest semblance of legality in the promise here laid. (It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance.) Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. (Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce.) (While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonial obligations.) Nor can he do so in the hope of a divorce. If a husband can bind himself to a future marriage conditioned on the getting of a

¹ See also as to the effect of illegality of part of the consideration for a promise, 15 *Am. & Eng. Encyc. of Law* (2d ed.), 988; *Simpson v. Normand*, 51 *La. Ann.* 1355; *Edwards County v. Jennings*, 89 *Tex.* 618, and cases cited on pp. 620, 621. Compare *Fishell v. Gray*, 60 *N. J. L.* 5; *Rosenbaum v. United States Credit System Co.*, 65 *N. J. L.* 255.

divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

*The demurrer must be sustained.*¹

GYLES MERRILL v. BYRON L. PEASLEE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 5, 1887—
MARCH 30, 1888.

[Reported in 146 Massachusetts, 460.]

CONTRACT upon a note for \$5,000, payable to the plaintiff and made by the defendant's testator.

The testator made the note, and simultaneously the plaintiff executed a declaration of trust, declaring that he would collect the note after the death of the testator, and pay the proceeds to Abby D. Peaslee, the testator's wife, provided she had lived with the testator as his wife until his death.

The evidence further showed that the note was given by the testator in consideration that his wife would return to him and live with him as his wife, and that she would not institute proceedings for a divorce.²

H. H. Carter, and *B. B. Jones*, for the plaintiff.

W. H. Moody, for the defendants.

W. ALLEN, J. The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her five thousand dollars after his decease, if she survived. The con-

¹ The decision was affirmed by the Court of Errors and Appeals, 39 N. J. L. 133. From that report the additional fact appears that the pending proceedings for divorce were instituted by the defendant's wife.

See also *Paddock v. Robinson*, 63 Ill. 99; *Leupert v. Shields*, 60 Pac. Rep. (Col. App.) 193. Compare *Brown v. Odill*, 104 Tenn. 250.

In *Graham v. Chicago, &c. Ry. Co.*, 53 Wis. 473, 484, the court said: "The lawfulness of an act done depends upon the laws in force at the time it is done; and, if unlawful when done, it does not become lawful by a subsequent change of the law which renders such act lawful thereafter. *Bailey v. Mogg*, 4 Denio, 60; *Roby v. West*, 4 N. H. 285; *Jaques v. Withy*, 1 H. Bl. 65; *Fletcher v. Peck*, 6 Cranch, 87; *Conley v. Palmer*, 2 Comst. 182.

"This court has enforced this rule to its full extent in cases of contracts void at the time they were made, under the usury law and the law prohibiting a party from recovering for liquor bills. *Gorsuth v. Butterfield*, 2 Wis. 237; *Root v. Pinney*, 11 Wis. 84; *Wood v. Lake*, 13 Wis. 84; *Lee v. Peckham*, 17 Wis. 383; *Morton v. Rutherford*, 18 Wis. 298; *Meiswinkle v. Jung*, 30 Wis. 361; *Austin v. Burgess*, 36 Wis. 186."

The same doctrine was applied in *Fulton v. Day*, 63 Wis. 112, to the case of a note given after the repeal of the United States Bankruptcy Law of 1867 in renewal of a note made void by that statute.

Compare *Hartford Fire Ins. Co. v. Chicago, &c. Ry. Co.*, 62 Fed. Rep. 904.

² The statement of facts has been abbreviated.

sideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. (Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfil the marital relation, and the fellowship of the wife is not an article of trade between husband and wife.) Like parental authority and filial obedience, conjugal *consortium* is without the range of pecuniary considerations. (The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money.)

It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the status of marriage, and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party to be used in the interests of justice and of society. (It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for the same consideration.) (The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration for it; it implies forgiveness founded on the supposed penitence of the wrongdoer and the hope that he will not again offend.) (The resumption of marital intercourse after a justifiable separation without such forgiveness, and only for money, shows connivance rather than condonation.) See *Copeland v. Boaz*, 9 Baxter, 223; *Van Order v. Van Order*, 8 Hun, 315; *Roberts v. Frisby*, 38 Tex. 219; *Miller v. Miller* (Iowa), 35 N. W. Rep. 464; *Adams v. Adams*, 91 N. Y. 381; *Garth v. Earnshaw*, 3 Y. & C. 584; *Gipps v. Hume*, 2 Johns. & Hem. 517; *Brown v. Brine*, 1 Ex. D. 5.

In the present case the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for the separate support of the wife, nor to a bar against proceedings by her for a divorce, except as that was involved in the resumption by her of marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion. See *Newsome v. Newsome*, L. R. 2 P. & D. 306. When the wife, who was living separate from her husband for justifiable cause, voluntarily returned to him, the law conclusively presumed that she returned because she had condoned the offence, and not because she was paid to live with him; and it will not

enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offence. In the opinion of a majority of the court the entry must be,

Exceptions overruled.

HOLMES, J. We must assume, and the majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions. *Butler v. Ives*, 139 Mass. 202. See *Nichols v. Nichols*, 136 Mass. 256.

In the case at bar the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was, that "she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return and did live with him as his wife until his death.

I do not understand it to be denied that this conduct on the wife's part was such a change of position, or detriment in the legal sense of that word, as to be a sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to return to cohabitation, and it seems to follow that, apart from illegality, the return itself was sufficient consideration for the note. *Burkholder's Appeal*, 105 Penn. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the ground of decision in *Miller v. Miller* (Iowa, Dec. 13, 1887), 35 N. W. Rep. 464, and, so far as appears, was the fact in *Copeland v. Boaz*, 9 Baxter, 223; *Roberts v. Frisby*, 38 Tex. 219. The last two cases seem to go in part also upon the ground that a contract by a husband upon a consideration moving from the wife is void, notwithstanding the intervention of a trustee, which cannot be taken here, in view of the cases first cited.

At all events, the giving up or refraining from proceedings for a divorce and alimony, which the wife is entitled to maintain, is both a sufficient and a legal consideration. *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; s. c. 14 Sim. 405, 5 H. L. Cas. 40; *Hart v. Hart*, 18 Ch. D. 670, 685; *Sterling v. Sterling*, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes to be that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal.

I find no decision or dictum in favor of this proposition. On the other hand, the Court of Errors and Appeals of New York has unanimously sustained the validity of a note given by a husband to a trustee

for his wife upon substantially the same consideration as in the case at bar, and has declared itself unable to see anything against public policy in the transaction. It seems probable that the Supreme Court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England. *Adams v. Adams*, 91 N. Y. 381; *Burkholder's Appeal*, 105 Penn. St. 31, 37; *Newsome v. Newsome*, L. R. 2 P. & D. 306; *Jodrell v. Jodrell*, 9 Beav. 45, 56, 59, and cases *supra*; *Symons v. Burton*, Monro, *Acta Can-cellariæ*, 266.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly lawful, whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money. Pub. Sts. c. 78, § 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations.

I agree too to what is said in *Adams v. Adams*, *ubi supra*. The arrangements "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."

I am authorized to say that Mr. Justice CHARLES ALLEN and Mr. Justice KNOWLTON concur in this opinion.¹

¹ In *Polson v. Stewart*, 167 Mass. 211, a covenant given in consideration of the forbearance to bring a well-founded suit for divorce was enforced. In *Barbour v. Barbour*, 49 N. J. Eq. 429, a promise in consideration of such forbearance and the resumption of conjugal relations was enforced. The decision was reversed in 51 N. J. Eq. 267, but not on the ground of illegality of the contract.

Agreements to facilitate divorce or separation are contrary to public policy. *Greenhood on Public Policy*, 488 *et seq.* and cases cited. See also *Loveren v. Loveren*, 106 Cal. 509; *Smutzer v. Stimson*, 9 Col. App. 326; *Stokes v. Anderson*, 118 Ind. 533; *Cross v. Cross*, 58 N. H. 373; *Train v. Davidson*, 20 N. Y. App. Div. 577; *Phillips v. Thorp*, 10 Oreg. 494; *Irvin v. Irvin*, 169 Pa. 529; *James v. Steere*, 16 R. I. 367; *Palmer v. Palmer*, 72 Pac. Rep. (Utah) 3; *Baum v. Baum*, 109 Wis. 47. Compare *Greenhood*, 484 *et seq.*; *Gibbons v. Gibbons*, 54 S. W. Rep. (Ky.) 710; *Parsons v. Parsons*, 62 S. W. Rep. (Ky.) 719.

Contracts of marriage brokerage are also illegal. *Greenhood*, 478 *et seq.*; *Morrison v. Rogers*, 115 Cal. 252; *Hellen v. Anderson*, 83 Ill. App. 506; *Johnson v. Hunt*, 81 Ky 321; *Ancliff v. June*, 81 Mich. 477; *Duval v. Wellman*, 124 N. Y. 156. See also 61 L. R. A. 641 n.

SECTION VI.

Effect of Illegality.

COPE v. ROWLANDS.

IN THE EXCHEQUER. 1836.

[Reported in 2 Meeson & Welsby, 149.]

PARKE, B. In this case, which was argued a few days ago, the plaintiff moved for judgment *non obstante veredicto*, on the ground that a plea in bar was bad in law. The plea was, that the work and labor, in respect of which the action was brought, was performed by the plaintiff as a broker in London, and that he was not duly licensed, authorized, and empowered to act as a stockbroker by the Court of Mayor and Aldermen, pursuant to the statute. We are of opinion that the plea is good in substance, and consequently the rule must be discharged.

It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. (It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.) Lord Holt, *Bartlett v. Vinor*, Carthew. 252.) And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract. In the cases of *Brown v. Duncan*, 10 B. & Cress. 93, 5 M. & Ry. 114, and *Wetherell v. Jones*, 3 B. & Ald. 221, both cases of violation of the revenue laws, the particular contract sued upon was held not to be interdicted; and in *Johnson v. Hudson*, 11 East, 180, as explained in the judgment of the Court of King's Bench in *Foster v. Taylor*, 5 B. & Ald. 898, 3 Nev. & Man. 244, the provision of the statute which requires persons dealing in tobacco to take out a license was held to be a regulation attaching to the plaintiff personally, and affecting him with the penalty, for the purpose of securing the license duty only, and not forbidding the contract itself; though it is to be observed that some little doubt has been thrown on the particular case in a very learned work, 2 Starkie on Evidence, 886. The principle, however, of that decision as above explained is correct:

and the question for us now to determine is, whether the enactment of the statute 6 Ann. c. 16 (altered as to the amount of penalty by 57 Geo. 3, c. 60) is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it; or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers. (On the former supposition the contract with a broker for his brokerage is not prohibited by the statute,) On the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing. (In order to decide this point it is only necessary to look at the statute itself.) (If its object had been simply the pecuniary advantage of the mayor and corporation, it would have been wholly unnecessary to have made any provision for securing the good conduct of the persons admitted.) (The more that should be allowed to practise, the larger the revenue of the city; but the enactment that all persons who should act as brokers should be admitted by the Court of Mayor and Aldermen, under such restrictions and limitations for their honest and good behavior as the court should think fit and reasonable, shows clearly that the legislature had in view, as one object, the benefit and security of the public in those important transactions which are negotiated by brokers.) The clause, therefore, which imposes a penalty, must be taken (in the language of Lord Holt, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action (so far as it relates to brokerage) is brought.)

This provision of the statute, so construed, is in affirmance of the right of the mayor and aldermen to admit brokers, which appears to have existed in the earliest times, and that for the convenience of trade and the public good, as may be collected from the statute 13 Ed. 1, st. 5, and the recitals in the 1 Jac. 1, c. 21, and in the 8 & 9 Wm. 3, c. 32.

The distinction between this and the case of *Ex parte Dyster*, 2 Rose's Bankrupt Cases, 349, which was cited on behalf of the plaintiff is very clearly explained by Lord Eldon in his judgment. The prohibition to act without admission, is statutory; the regulations adopted by the mayor and court of aldermen in the case of admitted brokers are not; they are purely municipal, and have not the force of a general law; the only consequences of their violation are those which the regulations prescribe.

One other case cited for the plaintiff remains to be noticed; it is that of *Gremaire v. Le Clerc Bois Valon*, 2 Camp. 144, in which Lord Ellenborough held that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute 3 Hen. 8, c. 11, s. 1. It is certainly difficult to reconcile this case with the rule above laid down, for the provisions of that statute were clearly meant to secure to the public skilful practitioners in surgery and medicine;

but, on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of Lord Ellenborough, for they disposed of the case on another ground, namely, that there was no proof that the plaintiff had not been duly licensed. We therefore think that case is not a binding authority; and, for the reasons above given, are of opinion that the rule must be discharged.

*Rule discharged.*¹

JOHN BISBEE v. MARY MCALLEN.

MINNESOTA SUPREME COURT, AUGUST 28, 1888.

[Reported in 39 Minnesota, 143.]

VANDERBURGH, J. The question presented for consideration in this case is raised upon the sufficiency of the second defence set up in the answer, where it appears that the goods alleged to have been sold to the defendant, and for the price of which this action is brought, were sold by weight and measurement, and that such weight and measurement were unlawfully ascertained and fixed by certain unsealed measures, scales, and weights, which had never been proved, tested, or sealed, as required by the statute.) Under Gen. St. 1878, c. 21, § 11, a sale of goods, wares, and merchandise by any scale-beam, steelyard, weight, or measure, not proved and sealed in accordance with the provisions of that chapter, is made a misdemeanor, and subjects the person making such sale to a penalty of not less than five nor more than one hundred dollars. The provision for a penalty in this section implies a prohibition of such sales. That is to say, if goods are sold by weight or measure, the law absolutely requires that the scales or measures used should be approved by the sealer of weights and measures for the county, as the statute provides.

It stands admitted upon the record, then, in this case, that the sale in question here, as made, was prohibited, and in violation of the statute. The weighing or measuring is not a collateral matter, but is directly involved in the act of selling and the contract of sale. It regulates the quantity to be delivered and the amount to be paid. And where the statute has in view the prevention of fraud by the

¹ In the following cases it was held to afford no defence to a contract that it was made in violation of a revenue law.

Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 B. & C. 93; Smith v. Mawhood, 14 M. & W. 452; Larned v. Andrews, 106 Mass. 435; Mandlebaum v. Gregovitch, 17 Nev. 87; Corning v. Abbott, 54 N. H. 469; Ruckman v. Bergholz, 37 N. J. L. 437; Woodward v. Stearns, 10 Abb. Pr. n. s. 395 (see also Griffith v. Wells, 3 Denio, 226); Rahter v. First Nat. Bank, 92 Pa. 393 (see also Hertaley v. Geigley, 196 Pa. 419); Aiken v. Blaisdell, 41 Vt. 655. But see *contra* Creekmore v. Chitwood, 7 Bush, 317; Harding v. Hagar, 60 Me. 340, 63 Me. 515 (but see Randall v. Tuell, 89 Me. 442, 448); Curran v. Downs, 3 Mo. App. 468; Hall v. Bishop, 3 Daly, 109; Best v. Bauder, 29 How. Pr. 489; Condon v. Walker, 1 Yeates, 483; Sewell v. Richmond, Taylor (U. C. K. B.) 423; Mullen v. Kerr, 6 U. C. Q. B. (o. s.) 171.

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seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be upheld. *Griffith v. Wells*, 3 Denio, 226, and cases; *Lewis v. Welch*, 14 N. H. 294. (Here the intent of the statute is clearly to prevent sales by unproved and unsealed scales or measures, and its object is undoubtedly to protect the public from fraud or imposition by the use of false or inaccurate balances and measurements. It covers all cases of sales by weight or measure, and this case is clearly within it.) The doctrine appears to be too well settled to require extended discussion. *Brackett v. Hoyt*, 29 N. H. 264; *Smith v. Arnold*, 106 Mass. 269; *Woods v. Armstrong*, 54 Ala. 150 (25 Am. Rep. 671, notes and cases); *Ingersoll v. Randall*, 14 Minn. 304 (400). In some cases a remedy has been suggested and recognized outside the prohibited contract. *Pratt v. Short*, 79 N. Y. 437, 445. But no such question is involved in this case. In respect to defences of this kind we adopt the language of the court in *Lewis v. Welch*, *supra*: "The objection that the contract is illegal as between the parties is never very creditable to him who makes it. But it is not out of favor to him that the objection is sustained, but from regard to the law. The advantage he derives from it is altogether accidental." The supposed hardships of particular cases must yield to the general purposes of the act, and the modification of the law, if any shall be found necessary, must be by the legislature. *Order affirmed.*¹

¹ *Law v. Hodson*, 11 East, 300; *Little v. Poole*, 9 B. & C. 192; *Forster v. Taylor*, 5 B. & Ad. 887; *Miller v. Ammon*, 145 U. S. 421; *Hawkins v. Smith*, 2 Cr. C. C. 173; *Thompson v. Milligan*, 2 Cr. C. C. 173; *Lang v. Lynch*, 38 Fed. Rep. 489; *Gunter v. Leckey*, 30 Ala. 591; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Merriman v. Knox*, 99 Ala. 93; *Gardner v. Tatum*, 81 Cal. 370; *Kleckley v. Leyden*, 63 Ga. 215; *Johnston v. McConnell*, 65 Ga. 129; *Lorentz v. Conner*, 69 Ga. 761; *Tedrick v. Hiner*, 61 Ill. 189; *East St. Louis v. Freels*, 17 Ill. App. 338; *Hustis v. Picklands*, 27 Ill. App. 270; *Richardson v. Brix*, 94 Ia. 626; *Dolson v. Hope*, 7 Kan. 161; *Vannoy v. Patton*, 5 B. Mon. 248; *Mabry v. Bullock*, 7 Dana, 337; *Bull v. Harragan*, 17 B. Mon. 349; *Buxton v. Hamblen*, 32 Me. 448; *Durgin v. Dyer*, 68 Me. 143; *Richmond v. Foss*, 77 Me. 590; *Black v. Security Mut. Assoc.*, 95 Me. 35; *Miller v. Post*, 1 Allen, 434; *Libby v. Downey*, 5 Allen, 299; *Wheeler v. Russell*, 17 Mass. 257; *Hewes v. Platte*, 12 Gray, 143; *Smith v. Arnold*, 106 Mass. 269; *Sawyer v. Smith*, 109 Mass. 220; *Eaton v. Kegan*, 114 Mass. 433; *Prescott v. Battersby*, 119 Mass. 285; *Loranger v. Jardine*, 56 Mich. 518; *Solomon v. Dreschler*, 4 Minn. 278; *Buckley v. Humason*, 50 Minn. 195; *Pray v. Burbank*, 10 N. H. 377; *Lewis v. Welch*, 14 N. H. 294; *Caldwell v. Wentworth*, 14 N. H. 431; *Doe v. Burnham*, 31 N. H. 426; *Griffith v. Wells*, 3 Denio, 226; *Covington v. Threadgill*, 88 N. C. 186; *Holt v. Green*, 73 Pa. 198; *Johnson v. Hulings*, 103 Pa. 498; *Swing v. Munson*, 191 Pa. 582; *McConnell v. Kitchens*, 20 S. C. 430; *Stephenson v. Ewing*, 87 Tenn. 46; *Bancroft v. Dumas*, 21 Vt. 456; *Gorsuth v. Butterfield*, 2 Wis. 237, *acc.* See also *Singer Mfg. Co. v. Draper*, 103 Tenn. 262.

Compare *Harris v. Runnels*, 12 How. 79; *The Manistee*, 5 Biss. 381; *The Charles E. Wisewall*, 74 Fed. Rep. 802; *Pangborn v. Westlake*, 36 Ia. 547; *Coombs v. Emery*, 14 Me. 404; *Ritchie v. Boynton*, 114 Mass. 431; *Houck v. Wright*, 77 Miss. 476; *Drake v. Siebold*, 81 Hun, 178; *Strong v. Darling*, 9 Ohio, 201; *Niemeyer v. Wright*, 75 Va. 239; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352.

MILLWARD v. LITTLEWOOD.

IN THE EXCHEQUER, NOVEMBER 6, 1850.

[Reported in 5 Exchequer, 775.]

ASSUMPSIT. The declaration stated, that on, &c., in consideration that the plaintiff, being sole and unmarried, had, at the defendant's request, promised the defendant to marry him, the defendant promised the plaintiff to marry her. Averment, that the plaintiff hath always, from the time of the making of the defendant's promise, for a reasonable time, to wit, until, &c., continued and still is unmarried, and was, from the time of the defendant's promise until the discovery hereinafter mentioned, ready and willing to marry the defendant. That after the making of the defendant's promise, and before the commencement of this suit, to wit, on &c., the plaintiff discovered that the defendant was then married, to wit, to one Hannah Littlewood; and that the defendant, at the time of making his promise, and from thence hitherto, hath been and still is married; and that the plaintiff had not, at the time of the defendant's then promise, any notice of the defendant's then marriage.

Pleas, first, non-assumpsit; secondly, that the plaintiff had notice of the defendant's marriage.

At the trial, before Parke, B., at the last Chester Summer Assizes, the jury found a verdict for the plaintiff, damages £200.

Herbert Jones, Serjt., now moved to arrest the judgment. It is conceded that this case is similar to *Wild v. Harris*, 7 C. B. 999, where the declaration alleged that, in consideration that the plaintiff, being unmarried, had promised the defendant to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff remained unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that, although a reasonable time had elapsed, the defendant had not married the plaintiff, but, on the contrary, the defendant, at the time of his promise, was and still is married to another woman; and on the motion in arrest of judgment, the Court of Common Pleas held that the declaration disclosed a sufficient consideration for the defendant's promise, (at the same time observing that it was not absolutely impossible of performance, for the defendant's wife might have died within a reasonable time.) The only difference between that case and the present is that there the promise alleged was to marry within a reasonable time, here it is to marry generally. It is submitted, however, that the case of *Wild v. Harris* cannot be supported. A contract of this kind is *contra bonos mores*, and against public policy. The language of Lord Mansfield, in *Holman v. Johnson*, Cowp. 343, with reference to immoral and illegal contracts, applies here. Besides, at the time of the promise, the defendant could not perform

it, and therefore the promise is void. The Court of Common Pleas founded their judgment on the authority of Brooke's Abridgment, tit. "Conditions," fol. 152 b, pl. 119. That, however, professes to be an abridgment of the case in 40 Ass. 13, where the reporter adds, "*quære de isto judicio* ; for it seems that the condition was void, because the feoffee had a wife at the time." [Parke, B. — In Fitz. Nat. Brev. p. 205, H., it is said, "A woman enfeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment, and afterwards, the woman, for not performing the condition, entered again into the land upon the second feoffee, and her entry was adjudged lawful, and the condition good." Anno 40 Ed. 3, Lib. Ass.]

POLLOCK, C. B. There ought to be no rule. The case of *Wild v. Harris* does not in substance differ from this. Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a Court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection which ought to subsist between married persons that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good.

ALDERSON, B. It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefinite time. What was decided by the recent case in the Court of Common Pleas, I think, was rightly decided.

PARKE, B. I entirely concur in what has been said by the Court of Common Pleas in *Wild v. Harris*. The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried ; and that is a sufficient consideration to bind the defendant. It is unnecessary to express any opinion whether a promise by a married man to marry a woman after his wife's death is valid or not. The passage in Fitzherbert's Abridgment tends to show that it is a good promise. Here, however, it is enough to say that there is a sufficient consideration for the defendant's promise, namely, that the plaintiff remained unmarried ; and if she discovered, on the day after the defendant's promise, that he was a married man, I should nevertheless say that the consideration would be sufficient.

Rule refused.

¹ *Wild v. Harris*, 7 C. B. 999 ; *Daniel v. Bowles*, 2 C. & P. 553 ; *Paddock v. Robinson*, 63 Ill. 99, 100 ; *Davis v. Pryor*, 3 Ind. Ty. 396 ; *Kelley v. Riley*, 106 Mass. 339 :

WAUGH v. MORRIS.

IN THE QUEEN'S BENCH, JANUARY 24, 1873.

[Reported in *Law Reports*, 8 *Queen's Bench*, 202.]

BLACKBURN, J. This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice the material facts appeared to be, that the charter-party was made in France on the 7th of October, 1871, between the agent of the defendant and the master of the ship.

By the charter-party it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London; and a term in the charter-party was to the effect that all cargo should be brought and taken from the ship *alongside*.

The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in Council, made under the authority of the Cattle Diseases Act, France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. (There was no legal objection to this being done, but during the interval eighteen days beyond the lay-days elapsed, and it was for this detention that the plaintiff recovered.)

It appeared that the Order in Council had been made and published before the charter-party was entered into, but that in fact neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas Term before my Lord Chief Justice, my brother Mellor, and myself, when the court took time to consider.

We are of opinion that the rule should be discharged. The charter-party provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his

Stevenson v. Pettis, 12 Phila. 468; *Coover v. Davenport*, 1 Heisk. 368, acc. In *Blanchmacher v. Saal*, 29 Barb. 22, and *Pollock v. Sullivan*, 53 Vt. 507, it was held that an action of tort for deceit would lie, but not an action for breach of contract.

This promise is a part of the contract.

agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had no right to refuse, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable.) In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable.) See "The Teutonia," L. R. 4 P. C. 171, a case which would have been precisely in point, if the Order in Council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. (But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object.) But all that the ship-owner bargained for, and all that he can properly be said to have intended was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship.) If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay and exported it without the ship-owner having the slightest ground for complaining that his intention was frustrated. (We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks*, L. R. 1 Ex. 213, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell v. Robinson*, 8 M. & W. at p. 442, "for the express purpose of a violation of the law." But in the present case the ship-owner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.)

We quite agree that, where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that, in order to avoid a con-

tract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend that, if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods; for there would have been a want of *mens rea*. And it seems to us that the *mens rea* is as necessary to avoid a contract which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

MARTIN ROSENBAUM, PLAINTIFF IN ERROR, v. UNITED STATES CREDIT SYSTEM COMPANY, DEFENDANT IN ERROR.

NEW JERSEY COURT OF ERRORS AND APPEALS, JUNE 28, 1900—
JANUARY 25, 1901.

[Reported in 65 *New Jersey Law*, 255.]

COLLINS, J.¹ On December 1, 1892, the defendant, a New Jersey corporation engaged in the business of indemnifying against losses on credits, made a written contract with the plaintiff appointing him its agent in and for the State of Massachusetts for the term of five years, for a percentage on the amount of business secured as his compensation. The plaintiff, on his part in said written contract, agreed to act as such agent for the term named and to procure business to an extent stated each quarter—failing which the defendant might, at its option, terminate the contract; and further agreed that should he cease to be the defendant's agent, he would not engage in like business for three years thereafter. On September 4, 1894, the defendant was adjudged insolvent and a receiver was appointed for its creditors and stockholders. On October 2, 1894, its charter was forfeited, except for the purpose of collecting and distributing its assets. The plaintiff presented to the receiver a claim for damages for breach of said contract. The claim being disputed, the Chancellor authorized an issue or issues at law to determine its validity. The Supreme Court overruled a demurrer by the plaintiff to a plea of such insolvency and forfeiture, but on writ of error it was adjudged, by this court, that there was a breach of the contract, and that the forfeiture of the defendant's charter would not bar recovery of damages for such breach. Rosen-

¹ Portions of this opinion are omitted in which it was held that the plaintiff's agreement not to engage in similar business for three years, even if unenforceable, did not invalidate the rest of the contract, and in which the provisions of the Massachusetts statute referred to are stated.

baum v. United States Credit System Co., 32 Vroom, 543, reversing 31 id. 294.

The Supreme Court had also decided to overrule the plaintiff's demurrer to a plea that the business of the defendant was unlawful in Massachusetts; but after the announcement of the decision that plea was withdrawn, as were also certain other pleas held to be faulty, so that the judgment reviewed went only on the plea of insolvency and forfeiture. After the reversal the pleadings were recast and the cause proceeded to issue of fact. Trial was had in the Essex Circuit, resulting in a verdict for the plaintiff, which was set aside and a new trial ordered by the Supreme Court *in banc*. The report of the decision is in 35 Vroom, 35. Legal questions only were discussed — first, whether the plaintiff's agreement not to engage in business like that of the defendant for three years after he should cease to be its agent invalidated the entire contract, and second, the effect of alleged unlawfulness in Massachusetts of such business, a plea of that purport having been renewed. The first question was decided in favor of the plaintiff on the authority of *Fishell v. Gray*, 31 Vroom, 5. The second question was decided in favor of the defendant. Under the pleadings, as recited in the opinion read by Mr. Justice Van Syckel, the unlawfulness alleged was not disputed. The court's decision was merely that the plaintiff's ignorance of it gave him no right of action for breach of the contract, but that concealment from him by the defendant of its knowledge of it would entitle him to damages, in tort, under pleadings to be moulded accordingly.¹ Before the new trial, now the subject of review, I judge that new replications and subsequent pleadings were filed. In the present record the first plea is *non est factum*, on which issue is joined. The second plea is that the contract is void because a part of the consideration for the defendant's agreement was an agreement, by the plaintiff, not to engage, for three years after he should cease to be agent for the defendant, in any business like that of the defendant, which restriction

¹ The conclusion of the opinion is as follows:

"We are therefore of the opinion that it was correctly ruled in *Rosenbaum v. Credit System Co.*, 31 Vroom, 294, that no action can be maintained for failure to employ the plaintiff to do an act for which he was punishable by the Massachusetts law.

"*Rosenbaum's* compensation was to be a percentage upon the amount of business he transacted. He could not be compelled to do acts forbidden by law, nor can he require the company to pay him for services which he cannot render because the law forbids under a penalty.

"But, assuming that the plaintiff did not know of the existence of the Massachusetts law, and that the defendant company did have knowledge of it when the contract was entered into, a different question is presented. In that case it was clearly a fraudulent act on the part of the defendant company to engage the defendant in a five years' contract, from which the company knew he could derive no advantage, and the fraud was more pronounced in the fact that the plaintiff, in ignorance of the situation, was induced to enter into a contract to engage for a long period in the transaction of a business which would subject him to heavy penalties.

"For damages flowing from the alleged fraud, if proven, the plaintiff may maintain his suit."

is alleged to be unreasonable. The replication is that the restriction was reasonable, and on this issue is joined. The third plea sets out, *in extenso*, the statute of Massachusetts, hereinafter referred to, and avers that the business of the defendant, for which the plaintiff was agent, was, at the time of the contract, unlawful in that State. To this plea there are four replications. The first avers that, at the time of the contract, the plaintiff was a resident of Illinois, and ignorant of the laws of Massachusetts; the second avers to the same effect, and also that the defendant was cognizant of those laws, and had been refused a license to transact its business in Massachusetts, which matters it fraudulently concealed from the plaintiff; the third avers that the defendant knew and the plaintiff was ignorant of the laws of Massachusetts, and the fourth avers that defendant's business was not unlawful in that State. Issue is tendered on these several replications, by divers rejoinders concluding to the country, and accepted by formal *similiter*.

At the new trial the evidence at the former trial was used by consent. The plaintiff moved to mould the pleadings so as to present an issue of tort, but the learned trial judge refused to make order to that effect, and his ruling, being discretionary, is not reversible. Verdict in favor of the defendant was directed on the third plea, and the bill of exceptions of the plaintiff presents this direction, for our review, under the present writ of error brought on the consequent judgment against him.

On the first plea a case was made by the plaintiff that the defendant did not attempt to confute, and no support for the direction of a verdict is claimed under that plea. . . .

Nor do I think such direction can stand on the case made under the third plea, which alone moved the learned trial judge to give it.

The covenant of the defendant was not broken because of any supposed unlawfulness of the business contracted for, but because of the defendant's insolvency. Nor was it proved that the business was in fact unlawful. Of course it was not immoral, or, in the broad sense, illegal, but it is claimed that in Massachusetts it was prohibited by the statute pleaded. . . . The proof at the trial was that before the defendant began its operations in Massachusetts, the Insurance Commissioner had ruled that its business was not insurance within the definition of the statute, and that no certificate of authority to transact it was necessary; and that the plaintiff entered upon his agency as soon as appointed, and without interference on the part of the Massachusetts authorities, transacted a business of large volume for the defendant, down to the time of its becoming insolvent. I think, therefore, that the plaintiff was entitled to have a jury say whether, if the defendant had not become insolvent and ceased to do business, he would not have been permitted to continue in his agency, and on that ground, award him damages. Suppose the term of the contract had expired and the suit brought was for the agreed compensation. Surely an unlawfulness merely theoretical would afford no defence to the action. I see no rea-

son why it should do so when the breach of contract arises only from insolvency.

For all practical purposes the defendant's business was lawful in Massachusetts. Nor can I see that it was theoretically unlawful. One of the purposes for which the formation of insurance companies is authorized by the statute pleaded is "to guarantee the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds, and for the performance of other obligations." It seems to me that the acting as surety for the performance of obligations is exactly the defendant's business which is therefore within both the definition and the permission of the statute. If this view be correct, certificates of authority for the company and its agent to transact it were necessary. Those it behooved the defendant to procure, and it cannot set up its failure to do so as an excuse for the breach of its contract with the plaintiff. But we are referred to the reported case of *Clafin v. United States Credit System Co.*, 165 Mass. 501, decided April 1, 1896, in which, it is alleged, the Supreme Court of Massachusetts has interpreted the statute in question, and has held that the business of defendant is in that State unlawful. If this be so, the plaintiff's suit is not thereby defeated. No doubt, after such a decision, the business could no longer be transacted in Massachusetts, and the plaintiff's profits would cease, but the only effect in the present suit would be on the extent of his recovery.

It is not needful to go farther for the purposes of this writ of error, but it should be pointed out that the decision cited is not authoritative beyond the point that the business of the defendant was insurance within the definition of the Massachusetts statute. In its application of that adjudication to the case then in hand, the opinion read for the court is ambiguous. The suit was brought upon one of the defendant's contracts of indemnity, and recovery was contested on grounds not stated in the report of the case. The court *ex mero motu* avoided the contract, saying: "The contract sued on seems to be made unlawful by the provisions of Stat. 1887, ch. 214, § 3, both for the reason that the defendant had not been admitted to transact insurance here and because insurance of credits or accounts is not authorized by the statute." One of these reasons might be good, but both could not be. If credit insurance was unlawful, the defendant could not have been admitted to transact it. If the fact that defendant was not so admitted influenced the decision, the other reason assigned for it was mere *dictum*.

Of course, a plain decision of the Supreme Court of a State, interpreting one of its statutes, should, after its rendition, control judicial interpretation elsewhere, but I think the decision cited leaves the matter in hand still unsettled. The question involved was not argued, and no reference is made in the opinion to the authority to form an insurance company to act as surety for the performance of obligations. It is possible that that provision of the statute, blended as it is with another subject, was overlooked.

If, before the retrial of this action, an authoritative judgment of the Supreme Court of Massachusetts that credit insurance is in that State unlawful shall be pronounced, its effect on the plaintiff's recovery must then be considered.

I shall vote to reverse the present judgment, and award a *venire de novo*.¹

MAGIE, CHANCELLOR (dissenting). I am constrained to dissent from the opinion of the majority of the court in this case.

The ground of my dissent is this: Rosenbaum, by this action, seeks to liquidate and fix the damages which the defendant company (an insolvent corporation) should be charged with, for the non-performance of a contract made by it with him. The contract contemplated the procurement by Rosenbaum of contracts in the State of Massachusetts for the insurance by the company of accounts and credits. Such contracts have been judicially declared by the courts of that State to be unauthorized and unenforceable. In my judgment, it is immaterial whether the lack of authority to make such contracts was properly predicted upon the omission of a legislative grant or not. For it was distinctly decided that if such authority has been given, its exercise in that State was unlawful, unless the contracting company had been admitted to transact such business within that State in the manner required by its laws. *Clafin v. United States Credit System Co.*, 165 Mass. 501.

As it appears that the defendant company was not thus admitted to transact business in that State, its contracts were properly held to be unlawful. Damages for being prevented by the insolvency of the company from procuring contracts, which the company had no lawful authority to make, cannot, in my judgment, be recoverable.

It is proper to add that the question before us was not involved in the previous decisions reported in 31 Vroom, 294, or 32 Id. 543.

I therefore vote to affirm the judgment.²

¹ *Rocco v. Frapoli*, 50 Neb. 665, *contra*.

² Where the illegality of a contract resulted from facts unknown to the plaintiff, he was allowed relief in *Hotchkiss v. Dickson*, 2 Bligh, 348; *Congress Spring Co. v. Knowlton*, 103 U. S. 49; *Pullman Palace Car Co. v. Central Transportation Co.*, 65 Fed. Rep. 158; *Mobile, &c. R. R. Co. v. Dismukes*, 94 Ala. 131 (but see *Gulf, &c. Ry. Co. v. Hefley*, 158 U. S. 98; *Southern Ry. Co. v. Harrison*, 119 Ala. 539; *Gerber v. Wabash R. R. Co.*, 63 Mo. App. 145; *Wyrick v. Missouri, &c. Ry. Co.*, 74 Mo. App. 406); *Musson v. Fales*, 16 Mass. 332; *Emery v. Kempton*, 2 Gray, 257; *Beram v. Kruscal*, 18 N. Y. Misc. 479; *Burkholder v. Beetem's Adm.*, 65 Pa. 496. See also *Harse v. Pearl Life Ass. Co.*, [1903] 2 K. B. 92; *Cranson v. Goss*, 107 Mass. 439; *Miller v. Hirschberg*, 27 Oreg. 522; and *Millward v. Littewood* and note, *ante*, p. 552. Compare *Webster v. Sanborn*, 47 Me. 471.

**CHARLES P. BOWDITCH AND ANOTHER, TRUSTEES, v. NEW-
ENGLAND MUTUAL LIFE INSURANCE COMPANY.**

**IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 12 —
MARCH 1, 1886.**

[Reported in 141 Massachusetts, 292.]

MORTON, C. J. This is an action of tort in the nature of trover, to recover the value of certain negotiable coupon bonds held by the defendant as collateral security for several promissory notes signed by Sidney W. Burgess.

Benjamin F. Burgess held the bonds in dispute as trustee under the will of Lysander A. Ellis, deceased. At several times he applied to the defendant for loans of money upon the notes of his son Sidney, offering these bonds as collateral security. These applications were submitted to the finance committee, a committee charged with the duty of investing the funds of the defendant company, which passed votes authorizing the several loans, and these votes were afterwards approved by the directors. Thereupon Benjamin F. Burgess delivered the bonds to the defendant, and received the amounts of the loans.

Benjamin F. Burgess was a member of the finance committee, and was present at all the meetings, but neither spoke nor voted upon the question of allowing said application. The other members of the committee knew that the loans, though in the name of Sidney W. Burgess, were for the benefit of said Benjamin F. Burgess, or of his firm, composed of himself and Walter Burgess, another son.

At the time said loans were made and said bonds received, Benjamin F. Burgess and his firm were in good financial standing, and the members of the finance committee, except said Burgess, made the loans and took the security without any knowledge or suspicion that said securities were not the property of said Benjamin F. Burgess, or of said firm, and in the belief that said loans were abundantly secured, and were wise and prudent investments of the funds of the company. The presiding justice of the Superior Court, who heard the case without a jury, has found that, although the loans were in form loans upon the notes of Sidney W. Burgess, Benjamin F. Burgess was in fact the borrower of the funds of the corporation; and that said Benjamin F. Burgess took no part, on behalf of the corporation, in the transactions in which said loans were made.

For the purposes of this discussion, we treat the case as if the loans had been made in form and directly to Benjamin F. Burgess. We do not understand the plaintiffs to contend that the defendant is affected with the knowledge of Burgess of the fraud in the transfer of the bonds in dispute. Upon this point the case of *Innerarity v. Merchant's*

National Bank, 139 Mass. 322, is conclusive against them. But they contend that the contract between Burgess and the defendant was illegal and void; and that the defendant cannot retain the bonds which were given as security for the void contract.

This is the vital question in the case. The statute provides that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same, or be surety for such loans to others, or directly or indirectly be liable for money borrowed of the company." Pub. Sta. c. 119, § 47.

It is a rule universally accepted that, if a statute prohibits a contract in the sense of making it unlawful for any one to enter into it, such a contract, if made, is wholly void, and cannot be enforced. But it is often a difficult question to determine whether a statute forbidding an act to be done, or enjoining the mode of doing it, is prohibitory, so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. Though it may be impossible to formulate a rule which will reconcile all the adjudications, yet the decisions recognize a clear distinction between these two classes of cases. There is a large class of cases, both in this country and in England, in which statutes have enacted, in substance, that goods should only be sold in certain measures, or in a certain manner, or after being inspected and branded by public officers; and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void. The purpose of such statutes is to protect the buyer from the imposition of the seller, a purpose which would be wholly thwarted unless the contracts are held void, and therefore the intention of the legislature to make them void is inferred. *Miller v. Post*, 1 Allen, 434, and cases cited; *Libby v. Downey*, 5 Allen, 299; *Sawyer v. Smith*, 109 Mass. 220, and cases cited; *Benjamin on Sales*, §§ 530 *et seq.*

So statutes prohibiting any work on the Lord's day, except work of necessity or charity, have been construed to make entirely void any contract made in violation of their provisions. On the other hand, there are numerous cases where statutes forbid certain acts to be done, and in a sense forbid certain contracts to be made, and yet it is held that contracts made in contravention of the statutes are not void. When usurious contracts were forbidden by our laws, under a penalty of forfeiting threefold the amount of interest reserved or taken, the act of making such a contract was illegal, but the contract was not void. The imposition of the defined penalty showed that the legislature did not intend that the contract should be wholly void, as this would be imposing an added penalty. *Merrill v. McIntire*, 13 Gray, 157.

In *Larned v. Andrews*, 106 Mass. 435, it was held that the provisions of the internal revenue laws of the United States, prohibiting any persons from carrying on the business of wholesale dealers in merchandise until they should have paid the special tax therein provided for, did not invalidate sales made by persons who failed to comply with the

statute, or prevent them from recovering the price of the goods sold. The same point was decided in *Aiken v. Blaisdell*, 41 Vt. 655.

The Revised Statutes of the United States respecting national banks provide that a bank shall not lend to any one person, corporation, or firm a sum exceeding one tenth part of the capital stock actually paid in, and that national banks shall not take real estate as collateral security except for debts previously contracted; and it has been repeatedly held that contracts made in contravention of the statute are not void. *Gold-Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Crawfordsville National Bank*, 112 U. S. 405.

Where the officers of a savings bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment. *Holden v. Upton*, 134 Mass. 177.¹

Many other cases might be cited, in which it has been held that contracts made in violation of the provisions of statutes are not void, upon the ground that the statutes are intended merely to be directory to the officers or persons to whom they are addressed, and not to be conditions precedent to the validity of contracts made in reference to them. Each statute must be judged by itself as a whole, regard being had, not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract.

The statute we are considering does not in terms prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and, by its terms, seems intended to prescribe rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow. In the words of Lord Mansfield, in *Browning v. Morris*, 2 Cowp. 790, 793, the statute itself "has marked the criminal." It is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the

¹ Similar decisions under various banking laws are: *Savings Bank v. Burns*, 104 Cal. 473; *Union Mining Co. v. Rocky Mountain Nat. Bank*, 1 Col. 531; *Volts v. National Bank*, 158 Ill. 532; *Benton County Bank v. Boddicker*, 105 Ia. 548; *Lester v. Howard Bank*, 33 Md. 556; *Allen v. First Nat. Bank*, 23 Ohio St. 97; *First Nat. Bank v. Smith*, 8 S. Dak. 7; *Wroten's Assignee v. Armat*, 31 Gratt. 228.

officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.

The plaintiffs contend that, unless the contract is held void, the statute is rendered nugatory. But this is not so. If the investing committee loans to an officer in violation of the duty imposed by the statute upon it, all who participate in the act would be liable for all losses occasioned thereby, and thus the main purpose of protecting the policy-holders would be subserved. The plaintiffs rely much upon the case of *Albert v. Savings Bank*, 2 Md. 159. But that case, if not overruled, is very much shaken as an authority by the more recent case of *Lester v. Howard Bank*, 33 Md. 558, which supports the views of the defendant.

For the reasons stated, we are of opinion that the notes signed by Sidney W. Burgess are valid contracts, which can be enforced by the corporation. This being so, we see no ground upon which it can be held that the defendant is not entitled to hold the bonds which it received in good faith as collateral security for the notes. The bonds were negotiable or transferable by delivery, and the defendant took them for a valuable consideration, and without fraud. The plaintiffs contend that they were not taken "in the usual course of business," because the contract of borrowing by Burgess was illegal. The rule is often stated to be that, in order to hold such property against the true owner, the transferee must have taken it for a valuable consideration, in good faith, in the usual course of business, without notice of any want of title on the part of the party negotiating it. It is quite as often stated to be that the transferee must have taken it *bonâ fide* and for value. Both have the same meaning, and the defendant is within either statement of the rule. It gave value for the bonds; it took them in good faith, in the ordinary and usual course of a transaction of loaning money and taking collateral security, and without any notice, actual or constructive, that Burgess was not the owner, with full power to transfer them. As to the defendant, the loan was legal; and the fact that Burgess was violating his duty in borrowing the money does not take the transaction of pledging the bonds as collateral security out of the usual course of business, or tend to excite any suspicion in the defendant that the bonds were not his property.

We do not consider the fact of any consequence that the loans to Burgess were made in violation of the rule of the directors. This could not have more effect than a violation of the statute. Such a rule is a private regulation of the directors, and its violation or evasion could not affect the validity of the loans.

*Judgment for the defendant.*¹

¹ *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 1, acc. See further, 2 Cook on Corporations (5th ed.), 1625 *et seq.*

In this connection may well be considered many decisions in regard to contracts of foreign corporations forbidden by law to enter into such contracts. See 2 Cook on Corporations (5th ed.), 1677.

NATIONAL BANK AND LOAN COMPANY v. PETRIE.

UNITED STATES SUPREME COURT, FEBRUARY 24—MARCH 9, 1903.

[Reported in 189 *United States*, 423.]

HOLMES, J. This is an action to recover money paid to the plaintiff in error for certain bonds. One defence set up in the answer was that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void. Judgment went against the bank; it was affirmed by the appellate division of the Supreme Court, 46 App. Div. 634, and by the Court of Appeals, 167 N. Y. 589, and the case now comes here by writ of error. The ground of the action is that the sale was induced by false representations of the president of the bank. We do not state these particularly, because the findings and rulings of the State court with regard to them are not open. We have to deal with no question except the defence attempted under the United States statute, and therefore need not inquire whether they contained a stronger infusion of fraud than is allowed to vendors in the way of praising their wares.

As we are of opinion that the defendant in error is entitled to keep his judgment, it does not matter so much as otherwise it would whether the result is reached by a dismissal of the writ, on the intimation of *Walworth v. Kneeland*, 15 How. 348, 353; see *Conde v. York*, 168 U. S. 642, 649, or by an affirmance of the judgment. We shall assume that the defence under the statute was such a claim of immunity as to entitle the plaintiff in error to come here. *Logan County National Bank v. Townsend*, 139 U. S. 67, 72; *McCormick v. Market Bank*, 165 U. S. 538, 546. On that assumption, however, we do not perceive how the defence is made out on the record. The complaint, to be sure, alleges that the bank was acting unlawfully in selling the bond, but it does not appear that Petrie knew the fact, and it would be a strong thing to charge him with notice or a duty to make inquiries as to how the bank was conducting its business, or to make the validity of the sale depend upon the fact alone, irrespective of the purchaser's knowledge. See *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 579; *New York & New Haven Railroad v. Schuyler*, 34 N. Y. 30, 73; *Madison & Indianapolis Railroad v. Norwich Saving Society*, 24 Ind. 457, 462. The sale might have been lawful. It was not necessarily wrong. *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S. 122, 128. However, we need not stop at this preliminary difficulty or another suggested by the answer, on which no point was made. The answer alleges that the sale was without the authority or consent of the bank, and was not within the course of its regular business, which looks a good deal like an attempt to deny that there ever was an effective sale and yet to keep the price.

The declaration goes upon a rescission of the contract. It contains

ambiguous language, but the allegations of tender of the bond and that the tender still is kept good make the ground sufficiently clear. The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. See *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 61; *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 150. But a person does not become an outlaw and lose all rights by doing an illegal act. See *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong. See *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 151. It is true that the fraud was perpetrated by an agent, and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest, in which case, of course, Petrie must have his money back, the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. Such was *First National Bank of Allentown v. Hoch*, 89 Penn. St. 324. Here the attempt is to recover outside of it, treating it as set aside. An action for damages caused by fraudulent representations which induced a contract, affirms the contract and relies upon it, *Whiteside v. Brawley*, 152 Massachusetts, 133, 134, and therefore may be subject to the same defenses as an action brought directly upon the contract. *Weckler v. First National Bank of Hagerstown*, 42 Maryland, 581, 595, 597, seems to have been an action of this character in respect of a sale on commission by the bank. We express no opinion as to an action of that kind. See *Thompson v. Saint Nicholas National Bank*, 146 U. S. 240, 251; *Concord First National Bank v. Hawkins*, 174 U. S. 364. But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made. The record discloses no error re-examinable here.

Judgment affirmed.

KING v. KING, EXECUTOR, ET AL.

OHIO SUPREME COURT, NOVEMBER 27, 1900.

[Reported in 63 Ohio State, 363.]

ERROR to the Circuit Court of Cuyahoga County.

The plaintiff in error was the plaintiff below. Her action was to recover for personal services rendered in the performance of a contract made with James Howland in 1881, whereby she agreed to live with him and take care of him during his life. He was a man of means, well advanced in years, without family, living on Euclid Avenue in Cleveland, and much of the time in ill health. The plaintiff was a daughter of his niece. She performed the contract on her part, the service extending from the year 1881 to 1896, when Howland died. The contract, as stated in the petition, was that "this plaintiff agreed with the said James Howland that she would refrain from marriage while he should live, and that she would live with him and take care of him while he lived; and he, in consideration thereof, agreed that he would provide for her amply sufficient to make her comfortable and well off." Howland in his will left to plaintiff a legacy of five hundred dollars, but, save small amounts of money given her from time to time, did not perform the contract. A recovery was had in the common pleas. The judgment was reversed by the circuit court because of error in the charge in instructing the jury that the contract was a legal one, and if proven to have been made as alleged, and duly performed by plaintiff, there might be a recovery. To reverse this judgment of reversal this proceeding is prosecuted.

John F. Clark and *Geo. L. Phillips*, for plaintiff in error.

Smith & Blake and *Marvin & Shupe*, for defendants in error.

SPEAR, J. The sole ground of reversal is that the contract is void, because against public policy, being in restraint of marriage. Hence there could be no recovery. That contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement, as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, twofold: one, the promise to perform the service agreed upon; the other, not to marry during the continuance of such service. The first was a valid promise and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text-books and numerous decisions, the general rule is that if one of two considerations for a promise be merely void, the other will support

the promise, although if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. *Widoe v. Webb*, 20 Ohio St. 435; *Metc. on Con.*, 246; *Chitty on Con.*, 988; 1 *Parsons on Con.*, 456; *Comst. on Con.*, 24; *Pikard v. Cottels*, Yelv. 56; *Bliss v. Negus*, 8 Mass. 51; *Carleton v. Woods*, 28 N. H. 290; *Woodruff v. Hinman*, 11 Vt. 592; *King v. Sears*, 2 C. M. & R. 48; *Erie Railway Co. v. U. L. & E. Co.*, 35 N. J. L. 240; *Bradburne v. Bradburne*, Croke El. 149. This distinction between a contract merely void and an illegal contract would seem to be an important one. Courts, as a general proposition, are open for the enforcement of contracts, not for their destruction. So that, where parties have deliberately entered into a contract, valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage, and some substantial defect should be shown before a court will refuse enforcement; a mere technical objection should not prevail. Now a void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is non-enforceable. There is no provision, either by statute or at common law, which enjoins upon any particular person the duty to marry, nor can any one be punished for not marrying. To marry, or not to marry, is left to the free choice of all who are eligible to marriage. Hence to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside the pale of the law.

But, aside from this, in the present case the promise on the part of the woman which was of value to the man was the promise to care for him. The promise not to marry was a mere incident to the main purpose, entered into simply because it was supposed that, by remaining single, the woman could the better perform her contract. It was immaterial to the man whether she married or not so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become part of the substance of the general agreement; that agreement was for the performance of services. If the performance was adequate, and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact they had been rendered by a single woman rather than a married one; so that, had the plaintiff married, yet, if she satisfactorily performed her contract, the recipient of the services would lose

nothing by the fact of marriage. As matter of fact she did not marry, whether because of the contract, or for reasons wholly apart from it, is not material, for she was under no obligation to marry nor to refrain from so doing. She did perform the service; that the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law, and it is not easy to perceive how its presence in the contract, or its observance by her, or both facts, could place the parties in what is termed *in pari delicto*, i. e., in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed.¹ In such case the maxim *in pari delicto melior est conditio possidentis*, has, in reason, no application, and we think ought not to have application in law.

Courts refuse to enforce or recognize certain classes of acts because against public policy on the ground that they have a mischievous tendency, and are thus injurious to the interests of the State, apart from illegality or immorality. A contract in restraint of marriage is of this nature. But, as before suggested, it does not follow that all contracts which may have an element of insufficiency, and may be void as to one feature, are incapable of enforcement, or even that all that are illegal will not be enforced. Decisions are abundant in support of the proposition that even where the acts of the parties have been in violation of positive law the contract may, under some circumstances, be enforced. A case in point is *Lester v. The Bank*, 33 Md. 558. The bank's charter forbade a director, under penalty of fine and imprisonment, to borrow money from the bank. It was claimed that the act of thus lending by the bank was null and void; that no rights could accrue from it, and hence no action could be had by either party based upon it. The court held, however, that: "Contracts made in violation of statute, are not necessarily incapable of enforcement because of their illegality. Whether the courts will enforce them or not, is a question of public policy, and they will be enforced when it may be adjudged that such policy requires their enforcement." Robinson, J., in the opinion, remarks that: "Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is

¹ The English courts adopt a similar rule in regard to contracts in restraint of trade. "Although a person cannot bind himself to an unreasonable restraint of trade, yet if he submits to the restraint stipulated for as the consideration for a promise to pay an annuity, he may claim the payment whether the restraint be reasonable or unreasonable." Leake on Contracts (4th ed.) 516; *Bishop v. Kitchin*, 38 L. J. Q. B. 20. The same ruling was made in *Rosenbaum v. United States Credit System Co.* 65 N. J. L. 255; but it may be doubted if it would be generally followed in this country. *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Bishop v. Palmer*, 146 Mass. 469; *Clancey v. The Onondaga Salt Co.* 62 Barb. 395.

As to the rule in general in regard to illegal contracts executed on one side, see 15 Am. & Eng. Encyc. of Law (2d ed.), 999.

adopted not for the benefit of parties but of the public. It is evident, therefore, that cases may arise, even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy," and cites 1 Story's Eq. Jur., sec. 298. This policy of the law finds expression in our statutes authorizing the recovery back of money lost at gaming, and the decisions under them. See also, *Burkholder's Appeal*, 105 Penn. St. 31. To justify refusal of relief to the plaintiff, on the ground referred to, the court ought to be ready to hold that the public mischiefs would be greater by permitting a party to recover who had made and performed a contract otherwise well founded but embracing an agreement not to marry while in its performance, than by permitting the other party to have the full benefit of meritorious service for nothing, thus repudiating his agreements, all of which were legal and based upon at least one consideration entirely adequate and wholly lawful. We are not prepared to make such a holding, but are clearly of opinion that no mischiefs to the public would result from sustaining a right to recover in a case like the present comparable to those which would follow a contrary holding, one which would encourage the violation of contracts and the repudiation of just obligations after full value had been received.

Other phases of the case are argued by defendants in error. The printed record presented embraces only the question here treated. It is not the duty of the court to hunt through portions of the record not printed in the quest of other reasons why the judgment of the common pleas should have been reversed, and we decline to do so.

The judgment of the circuit court will be reversed and that of the common pleas affirmed.

CHARLES A. FOX v. GEORGE E. ROGERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 14—JULY 2, 1898.

[Reported in 171 *Massachusetts*, 546.]

HOLMES, J. This is an action of contract to recover for laying a drain from two houses of the defendant to a private sewer in the street in front, for the purpose of draining the surface water of the cellars, and for no other purpose. The judge before whom the case was tried found for the plaintiff, and it is conceded that the finding was warranted unless "the maintenance of the present action is contrary to the policy of the law." The principal matter relied on is that the pipes within and outside the building were Akron earthenware pipes, and not cast-iron, as required for drain pipes by St. 1892, c. 412, § 125 (see also § 135, and Rev. Ord. Boston, 1892, c. 42, § 18); and that even

if, as the plaintiff understood and still contends, these provisions do not refer to pipes intended only for surface drainage, yet the plaintiff took up and relaid a part of a private drain outside with which his pipes connected, which was a drain for sewage, and was within the statute and ordinance. It also is argued, with less confidence, we take it, that the plaintiff's work, or part of it, was plumbing within the meaning of the ordinances, and required a permit under said c. 42, § 16, and also could not be done lawfully except by a registered plumber. *Ibid.*, and see c. 17. And finally it is objected that whereas the plaintiff only had a permit to occupy a portion of the street, not exceeding twenty-five feet in length in front of the buildings, he did in fact open a different part of the street for fifty-eight feet, in breach of Rev. Ord. c. 43, § 57.

We shall not trouble ourselves about the construction of the statute and ordinances, because it does not follow that the plaintiff cannot recover if he broke them. There is no policy of the law against the plaintiff's recovery unless his contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way. *Barry v. Capen*, 151 Mass. 99, 100. The judge was warranted in finding that the defendant employed the plaintiff to build a suitable drain, and left all details to the plaintiff's discretion, simply promising to pay for the job when finished in consideration of the plaintiff's promise to do it,—a contract lawful on both sides. It is true that the plaintiff declares on an account annexed, setting out every item of labor and materials, but no question was raised on the pleadings; and even taking the case according to the pleadings, many of the items would be good. If the contract was what we have supposed, it was good as a whole. The supposed illegal acts entered neither into the promise nor into the consideration. It was not necessary to prove them even for the purpose of showing that the drain was finished, and that the time for payment had arrived. Probably the plaintiff's acting in excess of his license would be immaterial after the work was done. It may be that if the pipes are not of the material required by law, they are liable to be taken up, or that in some way the fact might affect the plaintiff's recovery, if that question were before us. But the only question is the fundamental one whether we can say, as matter of law, that the contract was illegal, and that the plaintiff can recover nothing. That, in the opinion of a majority of the court, we cannot say. It is perfectly plain that the parties did not intend to contract for anything illegal, and even if the contract had contemplated the specific items charged for, it may be that it could have been sustained, but on that we express no opinion. *Favor v. Philbrick*, 7 N. H. 326, 337 *et seq.* *Waugb v. Morris*, L. R. 8 Q. B. 202.

Exceptions overruled.

CHAPTER VII.

DISCHARGE OF CONTRACTS.

SECTION I.

PAROL AGREEMENT TO DISCHARGE.

CONIERS AND HOLLAND'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1588.

[*Reported in 2 Leonard, 214.*]

IN an action upon the case upon assumpsit by Coniers against Holland the defendant pleaded, that after the promise, that the plaintiff had discharged him of it. And by WRAY, Chief Justice, It is a good plea, and so it hath been often ruled, and it was late the case of the Lord Chief Baron, against whom in such an action, such a plea was pleaded, and he moved us to declare our opinions in Serjeant's Inn; and there by the greater opinion it was holden to be a good plea; for which cause the Court said to Buckley who moved the case that the plea is good, and judgment was entered accordingly.¹

FLOWER'S CASE.

ABOUT 1597.

[*Reported in Noy, 67.*]

A. BORROWED £100 of F. and at the day brought it in a bag and cast it upon the table before F. and F. said to A., being his nephew, "I will not have it, take it you and carry it home again with you." And by the court that is a good gift by parol, being cast upon the table. For then it was in the possession of F. and A. might well wage his law. By the Court, otherwise it had been, if A had only offered it to F. for then it was chose in action only, and could not be given without a writing.

¹ Equitable grounds for rescission, such as fraud and mistake, are not within the scope of this book. Rescission for non-performance is dealt with under Chapter V.

LANGDEN v. STOKES.

IN THE KING'S BENCH, MICHAELMAS TERM, 1634.

[Reported in *Croke Charles*, 383.]

ASSUMPSIT. Whereas the defendant on the 2d April, 9 Car. I. (for such a valuable consideration) assumed to go such a voyage in such a ship, before the August following, and alleges a breach in the non-performance.

The defendant pleaded that before any breach the plaintiff, on the fourth of April at such a place, *exoneravit eum* of the said promise. Hereupon the plaintiff demurred.

Rolls, for the plaintiff, now alleged that this pleading a discharge without showing how, was not good; and he cited divers books, 22 Edw. IV. pl. 40, that *indemnem conservet*, or *exonerabit*, is no plea.

Maynard, for the defendant, argued to the contrary, that forasmuch as this was an action grounded on a promise by words, it may be discharged by words before the breach thereof; and therefore *exoneravit* generally is a good plea; and he cited for this The Year-Book, 3 Hen. VI., pl. 36.

All the court was of this opinion (*absente* Berkley). RICHARDSON, Chief Justice, said that he knew it had been so resolved divers times; and the rule was remembered, *eodem modo quo oritur, eodem modo dissolvitur*. Wherefore it was adjudged for the defendant, *quod querens nihil capiat per billam*.

EDWARDS v. WEEKS.

IN THE COMMON PLEAS, TRINITY TERM, 1677.

[Reported in 2 *Modern Reports*, 259.¹]

ASSUMPSIT. The plaintiff declared that the defendant, in consideration that the plaintiff at his request had exchanged horses with him, promised to pay him five pounds; and he alleged a breach in the non-performance. The defendant pleads that the plaintiff, before any action brought, discharged him of his promise.

And upon a demurrer the question was, whether after a breach of a promise a parol discharge could be good. The case of *Langden v. Stokes*, Cro. Car. 383, 1 Sid. 293, was an authority that such a discharge had been good before the breach, namely: The defendant promised to go a voyage; the breach was alleged in non-performance; and the defendant pleaded that before any breach the plaintiff *exoneravit eum*; and upon demurrer it was held good before

¹ Also reported in 1 Mod. 262.

the breach. But here was no time agreed for the payment of this five pounds, and therefore it was due immediately upon request; and not being paid, the promise is broken, and the parol discharge cannot be pleaded.

And of that opinion was ALL THE COURT, and judgment for the plaintiff, *nisi*, &c.

Quære, If he had pleaded such a discharge before any request of payment, whether it had been good?¹

¹ In *King v. Gillett*, 7 M. & W. 55, the plea to an action for breach of promise of marriage was that before any breach the plaintiff "absolved, exonerated, and discharged the defendant." On special demurrer it was urged that the plea should have alleged rescission by mutual assent. The plea was held good, however, on the strength of precedents in *Rast. Entries*, 685; *Brown's Entries*, 67 (folio); *Hern's Pleader*, 31, and early decisions. The court, however, said the question was merely as to a matter of form, for though the plea was good "yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a rescinding of the contract previously made."

Dobson v. Espie, 2 H. & N. 79, was an action for the breach of an obligation to pay a deposit to an auctioneer as security for future performance of a contract for the sale of property; the defendant pleaded leave and license. On demurrer the court held the plea bad as not equivalent to "exonerated and discharged," but the implication is clear that a plea in the latter form would have been held good, and one member of the court, *Bramwell, B.*, not only said so, but expressed the opinion that even in its actual form the plea was good. On the authority of this decision it is stated in 1 *Smith's Leading Cases* (11th Eng. ed.) 350, (9th Am. ed.) 614, "A person bound by a contract not under seal may, before breach, be exonerated from its performance by word of mouth, without any value or consideration." So *Byles on Bills* (16th ed.) 311. See also *May v. King*, 12 Mod. 537, 538; *Martin v. Mowlin*, 2 Burr. 969, 979; *Edwards v. Walters*, [1896] 2 Ch. 157, 168.

In *Foster v. Dawber*, 6 Ex. 839, 851, *Parke, B.* said, however, "It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." See also *Anson on Contracts* (10th ed.) 291. In this country it is not probable that a contract right can be discharged before breach by parol without consideration. *Collyer v. Moulton*, 9 R. I. 90; *Clark on Contracts*, 608; *Harriman on Contracts* (2d ed.) § 505; 24 Am. & Eng. Encyc. of Law (2d ed.) 287. See also *Purdy v. Rome, &c. R. R. Co.*, 125 N. Y. 209, and cases *infra* in regard to the discharge of obligations on negotiable paper. But see *Robinson v. McFaul*, 19 Mo. 549; *Seymour v. Minturn*, 17 Johns. 169, 175; *Kelly v. Bias*, 54 Wis. 187, 191.

In *Foster v. Dawber*, it was held, in accordance with some early authorities, that the obligation of a party to negotiable paper might be discharged by parol without consideration, even after breach. (Compare *White v. Bluett*, 23 L. J. Ex. 36.) This doctrine has not been adopted by American courts. *Maness v. Henry*, 96 Ala. 454; *Scharf v. Moore*, 102 Ala. 468; *Upper San Joaquin Co. v. Roach*, 78 Cal. 552; *Rogers v. Kimball*, 121 Cal. 247; *Heckman v. Manning*, 4 Col. 543; *Adamson v. Lamb*, 3 Blackf. 446; *Denman v. McMahon*, 37 Ind. 241; *Carter v. Zenblin*, 68 Ind. 436; *Hanlon v. Doherty*, 109 Ind. 39; *Franklin Bank v. Severin*, 124 Ind. 317; *Shaw v. Pratt*, 22 Pick. 305; *Smith v. Bartholomew*, 1 Met. 276; *Bragg v. Danielson*, 141 Mass. 195; *Hale v. Dressen*, 76 Minn. 183; *Henderson v. Henderson*, 21 Mo. 379; *Irwin v. Johnson*, 36 N. J. Eq. 347; *Crawford v. Millsbaugh*, 13 Johns. 87; *Seymour v. Minturn*, 17 Johns. 169; *Campbell's Est.* 7 Pa. St. 100, 101; *McGuire v. Adams*, 8 Pa. St. 286;

TAYLOR v. HILARY.

IN THE EXCHEQUER, HILARY TERM, 1835.

[Reported in 1 Crompton, Meeson & Roscoe, 741.]

ASSUMPSIT. The declaration stated that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one Henry Holt to have goods as he might want them, not exceeding in the whole £200, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding, &c., did afterwards, to wit, &c., sell and deliver to the said Henry Holt certain goods of great value, not exceeding in the whole £200; to wit, of the value of £190, as he the said Henry Holt did want them; of which the defendant afterwards, to wit, on, &c., had notice. Breach, that Henry Holt had not paid for the said goods, or any part thereof, nor had the defendant, although often requested, paid for the same, or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff, agreed by and between the plaintiff and defendant that the plaintiff should supply to the said Henry Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months, by a joint bill at four months accepted by the defendant;

Kidder v. Kidder, 33 Pa. 268; *Horner's App.* 2 Pennypacker, 289; *Corbett v. Lucas*, 4 McCord L. 323. See, however, *Nolan v. Bank of New York*, 67 Barb. 24, 34.

The draftsman of the American Negotiable Instruments Law copied the provision of the English Bills of Exchange Act, 45 & 46 Vict. c. 16, § 62 (see also *Edwards v. Walters* [1896] 2 Ch. 157), which enacted that a renunciation in writing either before or after the maturity of negotiable paper is effectual without consideration. *Crawford*, Negotiable Inst. Law, § 203. In states where this law has been enacted therefore the previous American decisions are no longer applicable.

A contract under seal, of course, cannot be discharged by parol without consideration. *Irwin v. Johnson*, 36 N. J. Eq. 347; *Traphagen v. Voorhees*, 44 N. J. Eq. 21; *Tulane v. Clifton*, 47 N. J. Eq. 351; *Jackson v. Stackhouse*, 1 Cow. 122; *Albert's Ex. v. Ziegler's Ex.*, 29 Pa. 50; *Horner's App.* 2 Pennypacker, 289; *Ewing v. Ewing*, 2 Leigh, 337.

After breach, a simple contract obligation cannot be discharged by parol without consideration. *Edwards v. Walters*, [1896] 2 Ch. 157, 168; *Westmoreland v. Porter*, 75 Ala. 452; *Florence Cotton Co. v. Field*, 104 Ala. 471; *Mobile &c. R. R. Co. v. Owen*, 121 Ala. 505; *Swan v. Benson*, 31 Ark. 728; *Mendell v. Davies*, 46 Ark. 420; *Metcalf v. Kent*, 104 Iowa, 487; *Shaw v. Pratt*, 22 Pick. 305, 308; *Averill v. Wood*, 78 Mich. 342, 354; *Young v. Power*, 41 Miss. 197; *Northwestern Nat. Bank v. Great Falls' Opera House*, 23 Mont. 1; *Landon v. Hutton*, 50 N. J. Eq. 500; *Whitehill v. Wilson*, 3 Pen. & Watts, 405, 413. But see *contra*, *Green v. Langdon*, 28 Mich. 221.

In New York a doctrine obtains that a written acknowledgment by a creditor of receipt in full payment will discharge the debtor, though given without consideration. *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251; *McKenzie v. Harrison*, 120 N. Y. 260. See also *Lewis's Estate*, 139 Pa. 640.

which agreement of the defendant be the plaintiff, before any breach of the promise and undertaking in the said count mentioned, accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performances of that promise and undertaking. Verification.

To this plea the plaintiff demurred; and alleged, as cause of demurrer, that there was no material difference between the agreement set out in the count and that set out in the plea, and that the only difference applied to the time of credit to be given; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

Barstow, in support of the demurrer.

PER CURIAM. Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not, therefore, require an averment of performance.

FREDERICK THOMAS WEST, SURVIVING EXECUTOR OF JOHN
WEST, v. JOHN BLAKEWAY.

IN THE COMMON PLEAS, APRIL 29, MAY 4, 1841.

[Reported in 2 Manning & Granger, 729.]

TINDAL, C. J.¹ This is an action of covenant brought by the surviving executor of the lessor, who was himself a termor, against the lessee, upon a covenant in the lease to yield up the demised premises at the expiration of the term, together with all erections and improvements which, during the term thereby granted, should be erected, made, or set up, in or upon the said premises or any part thereof. The defendant, in his third plea, states that the interest in the lease vested in one Hicks, as assignee of the term, and that it was agreed between the lessor and Hicks that if Hicks would erect, make, and set up a certain erection or improvement, to wit, a greenhouse, in and upon the demised premises, during the continuance of the last-mentioned term, Hicks should be at liberty to pull down and remove such greenhouse at the expiration of that term, provided no injury was done to the demised premises in and about the removal of the greenhouse. It being found by the jury that the plea is true in fact, the question now arises whether it is good in point of law; and it appears to me, upon the best consideration I can bring to that question, that the plea contains no legal

¹ BOSANQUET, COLTMAN, and ERSKINE, JJ., delivered concurring opinions. A portion of the case holding the greenhouse in question an "erection or improvement" within the meaning of the lease is omitted.

answer to the declaration. If the lessor had occasioned the breach, that would have been an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of would have been the act of the lessor himself, and not, as charged, the act of the lessee. The lessee might have said: This was your own act, and therefore you are not damnified. But this plea appears to me to set up that which is merely a parol license. Now it is a well-known rule of law that *unumquodque ligamen dissolvitur eodem ligamine quo ligatur*. This is so well established that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne*, 2 Wils. 376, which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held, upon demurrer, that the covenant could not be discharged without a deed; and *Blake's case*, 6 Co. Rep. 43 b, was cited. Now if an action had been brought against the assignee, to have set up this defence would have been in direct violation of the rule to which I have adverted. How can it be an answer for the lessee if not for the assignee? Cases of conditions which have been waived, or the performance of which has become impossible, do not, I think, apply. No doubt in the case of a bond, if the breach be occasioned by the obligee, or if the performance of the condition be rendered impossible by his act, no forfeiture is incurred. Though the bond, however, is under seal, the condition is of a thing resting on evidence only. It may be compared to matter *in pais*. But in the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created. If it could be maintained, as was contended on the part of the defendant, that the third plea disclosed an act which the lessor had done, or which he had compelled to be done, I think it would have been good. It would have been like the well-known plea of "damnified by his own default." But that does not appear to me to be the true construction of this plea; and I think that the rule for entering up judgment *non obstante veridicto* must be made absolute.¹

WILLIAM MC CREERY ET AL., APPELLANTS, v. MELVILLE C.
DAY ET AL., RESPONDENTS.

NEW YORK COURT OF APPEALS, NOVEMBER 26, 1889 — JANUARY 14,
1890.

[Reported in 119 *New York*, 1.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24,

¹ See *Ellen v. Topp*, *ante*, p. 47, and note, p. 49; also *Blagborne v. Hunger*, 101 Mich. 375. Compare *Clark on Contracts*, 618, and cases cited; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 521.

1889, which affirmed a judgment in favor of defendants, entered upon an order of Special Term granting a motion for judgment on the pleadings.

This action was brought to recover certain sums alleged to be due plaintiffs under a contract dated March 2, 1882, between the plaintiffs, as parties of the first part, and C. H. Andrews, as party of the second part, and C. K. Garrison, defendant's testator, as party of the third part.

By the terms of the contract, plaintiffs sold to Garrison a one-fourth interest in a contract for the construction of the railroad of the Pittsburgh, Youngstown, and Chicago Railroad Company, running from Pittsburgh to Akron, and agreed to turn over to Garrison a one-fourth part of all cash, bonds, and stock which should be received from that railroad company in payment for the work done under the construction contract. Garrison agreed to pay the plaintiffs, for work already done and materials furnished and rights acquired up to the date of the contract, the sum of \$150,000, and pay them, from time to time thereafter, one fourth of the amounts expended by them in the further construction of the road under the contract.

Plaintiffs sought to recover the one-fourth part of moneys expended by them after March 2, 1882, in carrying out their contract with the Pittsburgh, Youngstown, and Chicago Railroad Company, and also to recover interest during the time Garrison delayed payment of the sum of \$150,000.

The answer set up, among other things, the following facts: On the 18th day of April, 1882, the plaintiffs and said C. H. Andrews executed an agreement with the Pittsburgh and Western Railroad Company, by which the plaintiffs and C. H. Andrews agreed to sell to the Pittsburgh and Western Railroad Company a one-fourth interest in the Pittsburgh, Youngstown, and Chicago Railroad, as described, between Newcastle Junction and Akron, for \$150,000, those persons agreeing to pay for all expenditures for work done or materials furnished up to that date. The Pittsburgh, Youngstown, and Chicago Railroad Company was to abandon the further construction of the projected railroad between the towns of Newcastle Junction and Akron, for the building of which railroad between those points the Pittsburgh, Cleveland, and Toledo Railroad Company was created. On the 6th day of November, 1882, Garrison, the defendants' testator, wrote to the plaintiffs and to C. H. Andrews a letter acknowledging the receipt of the papers designed for the completion of the road from Akron to Newcastle Junction by the Pittsburgh and Western Railroad, consenting to sign them, but only on the understanding and condition "that I am not to pay any more money than Mr. Humphrey's company" (the Pittsburgh and Western) "pays, as provided in the agreement you made with him April thirteenth, — that is, \$150,000 and one fourth of the cost of the road to Newcastle Junction after that date." Garrison in the same letter asserted that he had given up the agreement of the second of March above mentioned,

and declared that he no longer desired any interest in the railroad from Newcastle Junction to Pittsburgh. Afterwards, and in compliance with the terms of that letter, the plaintiffs, with the said C. H. Andrews and the defendants' testator, caused an agreement to be indorsed on the contract of March 2, 1882, as follows: "It is agreed by the parties hereto that the within contract is annulled and of no further effect, the same having been superseded by the agreement and arrangement made in lieu thereof, as embodied in the letter of C. K. Garrison, . . . dated November 6, 1882, and by a certain agreement made between C. H. Andrews, W. C. Andrews, W. McCreery, James Gallerey, Solomon Humphreys, and C. K. Garrison, all bearing date October 25, 1882." This writing was signed by all the parties.

The agreement last referred to was fully carried out by all the parties. An order was made requiring plaintiffs to reply, which they did, substantially admitting the foregoing averments of the answer.

J. W. Hawes, for appellants.

William Bronk and Melville C. Day, for respondents.

ANDREWS, J. The parties by their agreement indorsed on the contract of March 2, 1882, in terms annulled that contract and declared that it should be of no further effect. The claim that the annulment of the contract did not discharge Garrison's obligation under the original contract to pay his proportion of expenditures made by the plaintiffs for the construction of the Pittsburgh, Youngstown, and Chicago Railroad, between the date of the contract and its annulment, depends on the intention to be deduced from the agreement of annulment, construed in light of the attending circumstances. Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily "be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission." Leake on Contracts, 788, and cases cited.

The agreement annulling the original contract recites that the contract had been "superseded by agreements and arrangements made in lieu thereof," embodied in Garrison's letter of November 6, 1882, and the several contracts executed by the parties to that contract, and others, bearing date October 25, 1882. In ascertaining the scope of the agreement annulling the original contract, the letter and the contracts of October 25, 1882, are to be deemed incorporated into the agreement. Construing these several writings together, they plainly show that the parties intended that Garrison should be discharged from all liability under his contract of March 2, 1882, for any expenditures theretofore made, or thereafter to be made, in constructing the line between Pittsburgh and Newcastle Junction. The letter was written after Garrison had received the contracts dated October 25, 1882, for execution, and declares that he will sign them on the condition, and understanding that he is not to pay anything more than Mr. Humphrey's company pays, under the plaintiff's agreement with him of

April 13, 1882, that is, \$150,000, and one fourth of the cost of the road to Newcastle Junction, after that date." The agreement with Mr. Humphrey of April 13, 1882, provided for the construction of the part of the line of the Pittsburgh, Youngstown, and Chicago Railroad between Newcastle Junction and Akron, by a new corporation to be formed, and that Humphrey should pay the plaintiffs \$150,000 for expenditures incurred and rights acquired on that branch of the road, prior to the making of the contract, and also one fourth of all expenditures thereafter made in its completion. The letter goes on to state that the agreement with Mr. Humphrey was made "after consulting with me, and, as it insured my road (Wheeling and Lake Erie Railroad) a line to Pittsburgh, I was ready to assent to it in place of the agreement of the second of March, and you know I have so considered it since, and that I was owner of one fourth of the new company, all previous agreements between us being superseded. I do not want any interest in the road from Newcastle Junction to Pittsburgh. I will pay whatever Mr. Humphrey's company has paid on the agreement of the 13th April."

The clear import of the proposition of Mr. Garrison in his letter is, that he would sign the contracts of October 25, 1882, provided he should be placed in the same position in respect to the enterprise, as that occupied by the company represented by Mr. Humphrey, and be relieved from all interest in, or obligation to contribute to, the construction of the part of the Pittsburgh, Youngstown, and Chicago Railroad between Pittsburgh and Newcastle Junction. Garrison thereafter executed the contracts of October 25, 1882, relating to the construction of the road between Newcastle Junction and Akron, whereby he assumed other and different obligations from those he had assumed by his contract with the plaintiffs of March 2, 1882.

The main claim in the action is to recover from Garrison's estate, under the contract of March 2, 1882, for a share of expenditures made by the plaintiffs in the construction of the part of the Pittsburgh, Youngstown, and Chicago Railroad between Pittsburgh and Newcastle Junction, after the date of that contract, and before the execution of the annulment agreement. The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which Garrison assumed under the contracts of October 25, 1882, was alone a sufficient consideration. *City of Memphis v. Brown*, 20 Wall. 289. There was a consideration also in the mutual agreement of the parties to the prior contract (which was still executory, although in the course of performance) to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof.

The contract of March 2, 1882, is sealed, while the agreement annulling it is unsealed. Upon this fact the plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal cannot be dissolved by a new parol executory agreement, although

supported by a good and valuable consideration, "for, every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." Countess of Rutland's case, Coke, Pt. V., 25 b. The application of this rule often produced great inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defences in legal actions, the common law rule has lost much of its former importance. A recent English writer, referring to the effect of the Common Law Procedure Acts in England, says, "The ancient technical rule of the common law, that a contract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." Leake on Contracts, 802. Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants, or obligations equitably discharged by transactions of which courts of law had no cognizance. 2 Story's Eq. § 1573. It is a necessary consequence of our changed system of procedure that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defence to an action on the covenant itself. It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded "not merely on the deed, but on the deed and the subsequent wrong." Broom's Legal Maxims, 848, and cases cited. The absurd results to which the common law doctrine sometimes led is illustrated by the case of *Spence v. Healey*, 8 Exch. 668, in which it was held that a plea to an action on covenant for the payment of a sum certain, that before breach defendant satisfied the covenant by delivery to, and acceptance by the plaintiff, of goods, machinery, etc., in satisfaction, was bad, Martin, B., saying, "I am sorry I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reason upon which the rule is founded." I suppose there can be no doubt that the facts presented by the plea in the case of *Spence v. Healey* would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach seems to have been disregarded in this State, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. *Fleming v. Gilbert*, 3 John. 580; *Lattimore v. Harsen*, 14 id. 330; *Dearborn v. Cross*, 7

Cow. 48; *Allen v. Jaquish*, Cowen, J., 21 Wend. 633. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such. *Kromer v. Heim*, 75 N. Y. 574, and cases cited.

In the present case it may be justly said, that when the agreement annulling the contract of March 2, 1882, was executed, there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement, then entered into, should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it admitted by the reply that the contracts of October 25, 1882, were carried out. It is a case, therefore, of an executory parol contract, made in substitution of the prior and sealed contract, afterwards fully executed, which clearly, under the authorities in this State, discharged the prior contract.

In respect to the claim to recover interest during the time the payment of the \$150,000 was delayed, it is a sufficient answer that the complaint admits that the principal sum was fully paid prior to September 13, 1882. The claim for interest did not survive, there being no special circumstances to take the case out of the general rule. *Cutter v. Mayor*, etc., 92 N. Y. 166, and cases cited.

We are of opinion that the facts admitted in the pleadings disclose that there was no right of action, and that the complaint, for this reason, was properly dismissed.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

WILLIAMS v. STERN.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL,
DECEMBER 19, 1879.

[Reported in 5 Queen's Bench Division, 409.]

ACTION in the Court of Passage at Liverpool to recover damages for the seizure and sale of the plaintiff's goods.

By an indenture, being a bill of sale, and dated the 9th of July, 1878, and made between the plaintiff (thereinafter called the mortgagor) of the one part, and the defendant (thereinafter called the mortgagee) of the other part, after reciting that the mortgagor had applied to the mortgagee for an advance of £30 and had agreed to pay the sum of £12 as a consideration for the same, and that the mortgagee had consented to make the advance upon having those sums secured in

manner thereafter appearing, it was witnessed that in consideration of £30 by the mortgagee paid to the mortgagor on the execution of the indenture, the mortgagor assigned to the mortgagee all the stock-in-trade, shop-fixtures, furniture, goods, chattels, and effects of the mortgagor then being in the shop, dwelling-houses, and premises of the mortgagor, situate in Liverpool, to hold the said property unto the mortgagee to and for his own use and benefit, subject to a proviso for redemption in case the mortgagor should pay to the mortgagee the sum of £42 by twenty-five consecutive weekly payments of £1 5s. each on every Monday before noon, the first payment to be made on the 15th day of July instant, and the balance of £10 15s. on the 6th day of January, 1879. The indenture contained a covenant by the mortgagor with the mortgagee for the repayment of £42, and then contained the following declaration: "It is hereby declared and agreed that notwithstanding the aforesaid proviso for redemption it shall be lawful for the mortgagee at any time after the execution hereof to take possession of the said property and to retain such possession (either in and upon the said shop, dwelling-house, and premises, or in any other place to which the mortgagee may think fit to remove it) until all moneys payable under these presents, together with all expenses which may be incurred by the mortgagee in and about taking possession, removing, and retaining possession of the said property, shall be fully paid; and, further, that if default be made by the mortgagor in payment of any instalments of the sum of £42 . . . on the days on which such instalments respectively shall become payable, the whole amount which at the time of such default shall be secured by these presents and shall be remaining unpaid shall at once become due and payable; and thereupon it shall be lawful for the mortgagee to sell the said property by public or private sale and receive the moneys arising therefrom, and retain to himself thereout all moneys remaining due on the security of these presents and all expenses which he may have incurred in taking and holding possession and removing and selling the said property, and all costs and charges which he may have incurred in defending and maintaining his rights, powers, and authorities under these presents; and that the surplus (if any) of such moneys shall be paid to the mortgagor. . . . And it is hereby agreed and declared that it shall be lawful for the mortgagee and his agents from time to time during the continuance of this security to enter and remain upon the said shop, dwelling-house, and premises, or any other premises upon which the said property or any part thereof may be, for the purpose of taking and holding possession of the said property, or of there selling the same by auction or of removing the same, or for any other reasonable purpose in connection with these presents; and in case the mortgagee or his agents shall be unable to obtain admission in the usual manner, it shall be lawful for him to break open the outer and inner doors and the windows in order to obtain admission." The other provisions of the indenture were immaterial to this action. The plaintiff paid thirteen

weekly instalments; but on the day when the fourteenth became due, he had to attend the Court of Passage as juryman; he called upon the defendant and asked for time; the defendant said that he would not look to a week. Relying upon this statement of the defendant, the plaintiff served as a juryman for three days, but on the third day the defendant seized the plaintiff's goods and sold them within the current week and before any fresh default had been committed by the plaintiff. It was alleged that the defendant had heard that the plaintiff's landlord intended to distrain upon the goods for rent in arrear. The judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand; the jury answered this question in favor of the plaintiff and assessed the damages at £80. The judge gave leave to move on the ground that there was no evidence of a waiver by the defendant. The Queen's Bench Division made absolute a rule for a new trial, but gave the plaintiff leave to appeal.

The plaintiff accordingly appealed.

F. W. Raikes, for the plaintiff.

D. French, for the defendant.

BRAMWELL, L. J. I think that this appeal must be dismissed. The plaintiff's evidence failed to show that the defendant had no right to seize his goods. When the plaintiff allowed the appointed time to elapse without paying the instalment, he was in default; whenever there is an omission to do an act pursuant to the terms of a contract, there is a default in the performance of it. It has been argued for the plaintiff that after the defendant had promised to wait for a week, he could not lawfully seize the plaintiff's goods; but I do not think that his promise was sufficient to prevent him from putting in force the powers of the bill of sale; it was not an undertaking which bound him; the promise was not supported by any consideration. The plaintiff was not induced to alter his position. A promise to wait founded upon a good consideration would have prevented the defendant from seizing the goods comprised in the bill of sale, even though a distress by the plaintiff's landlord had been threatened. For the plaintiff reliance has been placed upon *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123; but I cannot accede to the decision in that case, because I entertain great doubts whether it was correct. That was a seizure upon an alleged default, and upon the facts before them the Court of Queen's Bench held that there had been no default. But whether that decision was right or wrong, in the present case there was no evidence of a valid waiver by the defendant; no benefit accrued to him from his promise. The appeal must be dismissed.

BRETT, L. J. I agree with the view of the law enunciated by Bramwell, L. J. I think that upon the true construction of the indenture the defendant was entitled at any time to take possession of the goods comprised in it. If, however, a default was necessary in order to enable the defendant to seize, I think that such a default had occurred;

for "default" means simply the non-payment of money, and the plaintiff had failed to pay one of the instalments at the time when it became due. On behalf of the plaintiff reliance was placed upon the circumstance that the defendant had promised to wait for a week. This was not a misstatement as to existing facts; it was a mere naked promise, not binding upon the defendant. Has there been any misconduct on the part of the defendant? I think not: it appears that a distress by the plaintiff's landlord had been threatened; and under these circumstances I do not blame the defendant for changing his mind. In my opinion the decision in *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123, did alter the meaning of the words used by the contracting parties. I cannot agree with that decision. In this case there was no evidence to show that the defendant had waived any of his rights under the indenture, and the case ought to have been withdrawn from the jury. There must be a new trial.

COTTON, L. J. The only question before us is whether the indenture conferred upon the defendant a power to seize and sell the plaintiff's goods under the circumstances which actually happened. I agree that the plaintiff was in default when he failed to pay the instalment; for "default" simply means non-payment of a sum of money which is due. Did the alleged promise of the defendant prevent him from seizing and selling the plaintiff's goods? It was not founded upon any consideration. It seems to me that nothing rendered the seizure and sale wrongful. The defendant made no representation which operated to the plaintiff's disadvantage; he simply uttered his own private intentions; he gave no promise which was enforceable in law. The plaintiff has no claim for relief in equity; before the Supreme Court of Judicature Acts, 1873, 1875, the Court of Chancery would not have interfered to set aside the seizure.

*Appeal dismissed.*¹

ALBERT WEBER, JR., ADMINISTRATOR, v. EDWARD F.
COUCH AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 6-22, 1883.

[Reported in 134 *Massachusetts*, 26.]

HOLMES, J. This is an action on a judgment for \$1154.71, against Edward F. Couch and A. C. Couch, copartners. After that judgment was recovered, one of the defendants paid \$100 upon it, and the following agreement was indorsed on the execution: "In consideration of the sum of one hundred dollars paid by Edward F. Couch, one of the

¹ Compare *Bacon v. Cobb*, 45 Ill. 47; *Watkins v. Hodges*, 6 H. & J. 38; *Franklin F. I. Co. v. Hamill*, 5 Md. 170; *Wilgus v. Whitehead*, 89 Pa. 131.

within-named judgment debtors, I hereby release said Edward F. Couch from any and all liability on the said judgment, and acknowledge satisfaction of the within judgment so far as said Edward F. Couch is concerned, but reserve to myself the right to avail myself of certain securities, to wit, notes and mortgages in the hands of one A. H. G. Lewis, put up by one John Snow, of Providence, R. I., to release the attachment.

"Albert Weber. By Buckland & White, his attorneys."

The defendant E. F. Couch has died pending this action, but the other defendant insists that the above transaction discharged E. F. Couch, and therefore discharged him, the other joint debtor. To make out that E. F. Couch was discharged, the defendant suggests that the consideration of the dealing with him consisted of the securities mentioned as well as the money. But there is nothing outside of the instrument to countenance this suggestion, and the instrument itself expressly contradicts it. It states the consideration to be one hundred dollars and nothing else. It does not disclose the acquisition of any new rights in the securities by the plaintiff, or any change of position on the part of the defendant. Indeed, so far as appears, the defendant was a stranger to the securities, which were "put up by one John Snow." The defendant's argument therefore fails. A parol release of a judgment for money, in consideration of a payment of a smaller sum, is invalid at common law.

The defendant does not argue that the release had any greater effect because written on the execution, than it would have had if it had been written on any other piece of paper. It is still a parol release addressing itself directly to the judgment, which it is incompetent to discharge in that way. Neither can it have a greater indirect operation than it could have had directly. To that end it would be necessary first to read the release as purporting to discharge the execution, because it was indorsed on the writ, and because, if it had been effectual to discharge the judgment, it would have discharged the execution, and then, after providing this substituted machinery, to hold that the parol release of the execution was conclusive, and that the discharge of the judgment followed. This is impossible, and it is therefore unnecessary to consider what the effect of the indorsement would have been upon the liability of the other defendant if it had been valid; whether it would have discharged him apart from the reservations, and whether the reservations were sufficient to cut the words of release down to a covenant not to sue.

*Judgment for the plaintiff.*¹

¹ See also *Bruce v. Anderson*, 176 Mass. 161; *Whitehill v. Wilson*, 3 Pen. & Watts, 405.

SECTION II.

NOVATION.¹

ROE v. HAUGH.

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1697.

[*Reported in 12 Modern, 133.*²]

B. was indebted to A. in the sum of forty-two pounds, and C. in consideration quòd A. accipere vellet ipsum C. fore debitorem ipsius A. pro quadraginta duob. lib. eidem A. per B. tunc debit. in vice et loco ejusdem B. super se assumpsit, et eidem A. promisit quòd ipse C. easdem quadraginta duas lib. eidem A. solvere vellet. A. dies; his executors, on this promise, bring an assumpsit against C. averring in their count, that A. the testator trusting to the said promise of C. accepit præd. C. fore debitorem ipsius A. without saying anything that he discharged B. Non assumpsit pleaded; verdict and judgment for the plaintiff. Writ of error brought in the exchequer chamber.

The error insisted on was, that this is a void assumpsit, here being no good consideration; for except B. was discharged, C. could not be chargeable;

For which reason BLENCOWE, POWELL, and WARD were of opinion, judgment should be reversed; but POWIS, NEVILL, LECHMERE, and TREBY, that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of C. for as such it would not bind him, except B. was discharged; but they would construe it to be a mutual promise, viz. that C. promised to A. to pay the debt of B. and A. on the other side promised to discharge B. so that though B. be not actually discharged, yet if A. sues him, he subjects himself to an action for the breach of his promise.

The judgment was affirmed.

WILFRED TRUDEAU v. LUCIEN POUTRE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 29, 1895-
JANUARY 1, 1896.

[*Reported in 165 Massachusetts, 81.*]

CONTRACT. The plaintiff owned in partnership with one Picard the stock and fixtures in a drug store. The plaintiff sold his interest to

¹ The best treatment of this subject is in an essay by Professor Ames in 6 Harv. L. Rev. 184. See also Am. & Eng. Encyc. of Law (2d ed.).

² Also reported in 1 Salk. 29 and 3 Salk. 14.

Picard and took from the latter a note secured by mortgage on the stock. Later Picard sold the stock and fixtures to the defendant, and the plaintiff, as part of the transaction, at the same time, discharged Picard in order to enable Picard to transfer a clear title. The evidence was conflicting as to the promise, if any, made by the defendant to the plaintiff, but there was evidence that the defendant agreed to give two mortgages to secure part of the plaintiff's claim and agreed to pay the balance in cash.

The presiding judge directed a verdict for the defendant and the plaintiff alleged exceptions.

L. E. Wood, for the plaintiff.

J. W. Cummings (*E. Higginson & C. R. Cummings* with him), for the defendant.

MORTON, J. If the parties mutually agreed that the defendant should pay the plaintiff what Picard owed him, and the plaintiff accepted the defendant as his debtor in the place of Picard, and released Picard, the contract thus entered into would be valid and binding. *Wood v. Corcoran*, 1 Allen, 405. *Lord v. Davison*, 3 Allen, 131. *Caswell v. Fellows*, 110 Mass. 52. The release of Picard would constitute a sufficient consideration for the defendant's promise to the plaintiff. *Caswell v. Fellows*, *ubi supra*. And the promise declared on being an original undertaking and not a collateral one, and not including the giving of a mortgage by the defendant on his real estate, would not be within the Statute of Frauds. *Lord v. Davison* and *Wood v. Corcoran*, *ubi supra*. If there was no doubt as to the terms of the agreement, it would be a question of law for the court whether a substitution had been effected. *Sinclair v. Richardson*, 12 Vt. 33. But if the terms of the agreement were equivocal or uncertain, then it would be a question of fact for the jury, under suitable instructions. *Sinclair v. Richardson*, *ubi supra*. If the agreement of the plaintiff to release Picard and take the defendant in his place was conditional upon the defendant's giving the mortgages, or such condition formed an essential part of it, then it is clear that there was no substitution, for the mortgages were not given. But if the defendant promised to pay the debt, and the plaintiff, relying on that, released Picard, so that if the defendant did not perform his agreement the plaintiff's only remedy would be an action against him for the breach of it, then the substitution was complete, and Picard became entitled to a discharge of the mortgages which he and his wife had given to the plaintiff, the debt which they were given to secure having thus been cancelled and discharged. And it would not affect the plaintiff's right of recovery that the defendant also orally agreed to secure the plaintiff by a mortgage on his real estate. *Rand v. Mather*, 11 Cush. 1. *Haynes v. Nice*, 100 Mass. 327.

It was in dispute between the parties which of the two constructions indicated above should be given to the transaction; the defendant contending in substance that it should be the former, and the plaintiff the latter. There is language and there are circumstances and considera-

tions consistent with either view; but there is nothing, we think, so clear as to enable us to say how the case should have been decided as matter of law.

*Exceptions sustained.*¹

FAIRLIE v. DENTON & BARKER.

IN THE KING'S BENCH, TRINITY TERM, 1828.

[Reported in 8 Barnewall & Cresswell, 395.]

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial the following facts appeared. The defendants had contracted to pay S. Crossland and J. Stonehouse £1,200 in six instalments at specified stages in the progress of certain buildings under construction by Crossland and Stonehouse. The defendants paid on orders from Crossland and Stonehouse £872 and being applied to for further advances, refused on the ground that the plaintiff had lodged in their hands orders signed by Crossland and Stonehouse for upwards of £200, and for these, they, the defendants, were responsible.

The plaintiff gave no evidence that at the time of this conversation the buildings were in such a state of forwardness as to entitle Crossland and Stonehouse to more than the £872 which they had already received, and from the defendants' evidence the contrary might be inferred.

LORD TENTERDEN directed a verdict for the plaintiff if they thought the defendant had ever acknowledged that they held in their hands money for the plaintiff. The jury found a verdict for the plaintiff, but a rule nisi for entering a nonsuit was obtained by Sir James Scarlett.²

F. Pollock and *R. V. Richards* now showed cause.

Sir J. Scarlett, and *Comyn*, *contra*, were stopped by the court.

LORD TENTERDEN, C. J. It is a general rule of law, that a chose in action cannot be assigned. There is, however, an exception to that rule. It has been held that where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from A. to B., and that a larger sum is due from C. to A., and the three agree that C. shall be B.'s debtor, instead of A., and C. promises to pay B. the amount owing to him by A., an action will lie by B against C. Here, at the time when the defendants were supposed to have admitted that they were responsible to the plaintiff, there was not any defined and ascertained sum due from them to Crossland and Stonehouse. Crossland then asked the defendants for a further advance, which

¹ The statement of facts is abbreviated, and a portion of the opinion stating some of the evidence is omitted.

² The statement of facts has been abbreviated.

they refused, because they held orders in favor of the plaintiff for payment of more than £200. But non constat that that sum was then due from them to Crossland and Stonehouse. It might afterwards have been to become due in the progress of the work, which was not at that time completed. It lay upon the plaintiff, in order to bring himself within the cases which form exceptions to the general rule, to show that at the time when the defendants are supposed to have promised to pay him the debt owing to him by Crossland and Stonehouse there was a debt ascertained to be due to them from the defendants. Not having done so, he has not brought himself within the exception to the general rule, and, therefore, the rule for a nonsuit must be made absolute.

*Rule absolute.*¹

MOTT GLEASON v. DAVID FITZGERALD, SURVIVOR, ETC.

MICHIGAN SUPREME COURT, APRIL 19-MAY 28, 1895.

[Reported in 105 Michigan, 516.]

GRANT, J. July 18, 1889, the defendants made a contract with the Chicago & West Michigan Railroad Company by which they agreed to lay and ballast the track between Baldwin and Traverse City. The work was to be done under the instruction and supervision of its chief engineer, whose decisions were to be final and conclusive on all matters of dispute. The defendants sublet this work to the firm of Lambert & Van Norman. The contract contained the following provision :

"That the said parties of the second part reserve the right to pay off the laborers who work for said first party under this contract, and the said party of the first part, for and in consideration of the sum of one dollar, hereby sells, releases, and assigns unto the party of the second part all moneys and sums of money due to laborers under this contract, and in execution of the same ; *but it is expressly agreed that the party of the second part assumes no liability to the laborers who do work in execution of this contract, over and above the amount assigned by the party of the first part to the party of the second part, and not over and above the amount due and payable to the party of the first part.*"

Lambert & Van Norman continued for some time to work under the contract. A dispute arose between them, and Lambert & Van Norman finally abandoned it. Lambert & Van Norman, through their time-keeper, gave time checks to their workmen, certifying the number of

¹ Clark v. Billings, 59 Ind. 508, 509; Bristol Milling &c. Co. v. Probasco, 64 Ind. 406, 413; Rev. Civ. Code La. Art. 2186; Linneman v. Moross, 98 Mich. 178; Adams v. Power, 48 Miss. 450; Murphy v. Hanrahan, 50 Wis. 485, acc. Compare Cherry v. Jones, 41 Ga. 579; Torrey v. Grant, 18 Miss. 89; Courtois v. Perquier, 1 Brev. 314; Edwards v. Skirving, 1 Brev. 548.

days' work performed, the rate per day, the deductions, and balance due, and made payable at Hannah, Lay, & Co.'s Bank, at Traverse City, Mich. Lambert & Van Norman had no money at the bank with which to pay these checks. Plaintiff insists that he purchased these time checks, and made an arrangement by which the defendants agreed to pay them; that he released Lambert & Van Norman from liability; and that a complete novation was effected. It is insisted on the part of the defendants that a novation was not proven, and that before a novation could take place a valid indebtedness must be shown to exist between Lambert & Van Norman and the defendants.

It is not necessary, under the facts of this case, to determine whether the defendants were in fact indebted to Lambert & Van Norman. They had assigned to the defendants all moneys due from them to their laborers. If, therefore, the defendants had agreed to pay the plaintiff, and he had released Lambert & Van Norman, it is entirely clear that they could not defend upon the ground that they had in fact overpaid Lambert & Van Norman. The statute of frauds has no application to such case. The evidence on the part of the plaintiff tended to show that he made the agreement with defendants and Lambert & Van Norman, that defendants made the promise to pay with notice that Lambert & Van Norman were to be released, and that these time checks were in fact charged up against Lambert & Van Norman in an account rendered by the defendants. It is unnecessary to review the evidence at length. The question was fairly left to the jury, under proper and explicit instructions, and there was ample evidence to support their verdict. The case is controlled by *Mulcrone v. Lumber Co.*, 55 Mich. 622.

*Judgment affirmed.*¹

SECTION III.

Release.

GIBBONS v. VOUILLON.

IN THE COMMON PLEAS, NOVEMBER 16, 1849.

[Reported in 8 Common Bench, 483.]

WILDE, C. J. This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part; and the plea, which is pleaded either as a bar to the action generally, or in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercier; that the several debts due to the parties of the second and third parts, which were

¹ *Edenfield v. Canady*, 60 Ga. 456; *Bower v. Weber*, 69 Iowa, 286, acc.

set opposite to their respective names, had accrued ; that the defendant was unable immediately to satisfy those debts ; that, for the purpose of realizing his effects, it had been deemed advantageous to all the parties interested that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees ; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes on to state that in pursuance of the agreement the several persons parties thereto of the second and third parts by that indenture gave and granted unto the defendant until the 17th of May, 1848 (the indenture bearing date the 17th of May, 1843), full and free license and authority to pass and repass, &c. ; and that it was further provided that, if any of the said persons, parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained should in any such respect be contravened, and of and from all manner of actions, suits, &c., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference here mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor. The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar ; but it is said, upon the supposed authority of *Ford v. Beech*, that the only remedy of the covenantee is by a cross action for damages.¹ Nothing, however, fell from the

¹ The arguments of counsel so far as they related to the question whether the release was a bar to the action, were as follows :—

Willes, in support of the demurrer. . . . The proviso in question being contrary to a rule of law, it cannot operate as a release. Assuming, as, indeed, was expressly held in *Ford v. Beech*, 11 Q. B. 852, that a covenant not to sue for a given time cannot be pleaded in bar, the question here will be, whether, the general intention of the parties being to keep alive the debt, any form of words the practical effect of which will be to prevent the creditor from suing within the time can be regarded. The foundation of the decision in *Ford v. Beech* was this, that if the deed barred or suspended the creditor's remedy for any period, however short, the effect would be a total release of the debt ; and therefore the court construed the agreement as giving the defendant merely a right of action for breach thereof if the plaintiff sued while the payments were continued. [MAULE, J.—Is there anything to prevent a release from being made to operate *in futuro*, if the parties so intended? If that may be done, can more correct words be framed for the purpose than those here used?] It may be that this is good as a defeasance. [MAULE, J.—If it destroys the debt, it is a good answer to the action, by whatever name it may be called. V. WILLIAMS, J.—Is there any dif-

court in *Ford v. Beech* to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar?

ference between a defeasance and a condition, except that the one is in the same, and the other in a different instrument? WILDE, C. J. — A covenant not to sue does not operate as a release. But here you have agreed that, if you do sue, a release shall come into operation. The mere addition of something as a consequence does not alter the legal operation of the instrument.] The effect of this deed, if it operates at all as a release, is to make it operate as an immediate release. [MAULE, J. — May there not be an effective stipulation to put an end to a debt?] That would be a defeasance, and it is not so pleaded. Either this must be taken to be an immediate discharge of the debt, or the court must say that the parties have attempted to do what cannot be done, namely, to suspend the debt for five years, and then revive it. [MAULE, J. — You are seeking to enforce a construction of the deed which is manifestly contrary to the intention of the parties. Is there any inconsistency in an agreement to suspend a present debt for a given period? WILDE, C. J., referred to *Kearslake v. Morgan*, 5 T. R. 513, and *Stracey v. The Bank of England*, 6 Bingh. 754; 4 M. & P. 639.] The case of a negotiable security is an exceptional case. *James v. Williams*, 13 M. & W. 828, 833. It would be unjust to the debtor to allow his creditor to sue him while the bill was outstanding. [WILDE, C. J. — Suppose the bill is not negotiable?] In that case it clearly operates no suspension. [MAULE, J. — If the thing which the parties agreed to do here may be done for one consideration, why may it not for another?] The principle upon which the cases proceed, is referable to the law-merchant. [MAULE, J. — The case of a bill of exchange is complicated with some difficulties. But is there anything unlawful in giving an extended credit for five years?] It is adding a new incident to a chose in action. A creditor cannot bind himself not to sue for a debt for a limited period, except by taking a negotiable security. In *Stracey v. The Bank of England* there was no suspension of the right of action. When once a right of action has accrued there is no mode by which the creditor's right can be got rid of, but accord and satisfaction, and release. [V. WILLIAMS, J. — Is it inconsistent with the character of a chose in action that, on the happening of a given event five years hence, the debt shall be discharged?] In that case there would be no suspension of the debt until the happening of the event contemplated. [V. WILLIAMS, J. — A legacy is in the nature of a chose in action. Suppose a legacy, with a condition that it should be void if the legatee filed a bill for it, — would that be bad?] Possibly not. [V. WILLIAMS, J. — In *Cooke v. Turner*, 15 M. & W. 727, such a condition in a devise of real estate was held to be valid.] A prospective right of action may be waived; as in *King v. Gillett*, 7 M. & W. 55, where, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it was held to be a good plea that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. *Stracey v. The Bank of England* is expressly overruled by *Ford v. Beech*. [WILDE, C. J. — It was not so intended: I wrote the judgment in *Ford v. Beech*; and I remember I had a very long discussion with one of my learned brothers upon it.] The plaintiff there clearly could have no right of action until he called for a transfer of the stock. In *Thimbleby v. Barron*, 3 M. & W. 210, it was held that a covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt, the learned counsel who there sought to uphold the plea being told by the court that the books were full of authorities against him. [TALFOURD, J. — The court of error, in *Ford v. Beech*, seem expressly to contemplate this case. Parke, B., in delivering the judgment, says: "In 1 Roll. Abr. 939, tit. Extinguishment (L), pl. 2, it is said, that, 'if the obligee grants to the obligor that he shall not be sued or vexed upon the said obligation before such a day, and, if he is, then that he shall plead the said grant as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release.' It must be observed that in that case it was expressly covenanted that in the event of the covenantor suing upon the obligation, contrary to his covenant, the obligation should be void, and that the obligor

By reason of the rule that the right to a personal action once vested, and suspended by the voluntary act of the party, for however short a

a covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case, therefore, went much beyond a mere covenant not to sue." On referring to the passages in the Year Books, upon which Rolle founds himself, it will be found that the debt there is held to be gone at once. [TALFOURD, J. — *Ayloff v. Scrimshire*, Carth. 63, is an authority against you.] That case presents different aspects, according to the book in which it is reported. In the reports in Holt and in Shower, the deed is stated to have had the very same provision that is found here. [V. WILLIAMS, J. — Shower states as the principal case what Comberbach states as an illustration.] In Carthew it is somewhat differently reported; and the note at the end of the case — upon which, no doubt, reliance will be placed on the other side, — is evidently a mistake. [WILDE, C. J. — Carthew professes to be setting out the terms of the covenant, which the other reporters do not. MAULE, J. — Littleton, § 467, and the commentary thereon (Co. Litt. 274 a, 274 b), show that a man may release upon condition, though not for a limited period.] Littleton and Coke are there treating of rights other than rights of action. In *Carvil v. Edwards*, 1 Show. 330, it was held that to debt on bond by an executor, the defendant cannot plead in bar that the testator and other creditors of the defendant entered into a letter of license with him, in which they covenanted and agreed not to sue him within such a time, on pain of forfeiture; for it does not amount to a release of their debts.

Hugh Hill, *contra*. . . . It is then said that the covenant in question is not pleadable in bar to an action for one of the debts mentioned in the deed; but, at most, only gives ground for a cross-action, or for a bill in equity. The bringing of this action is not merely a violation of the covenant which the plaintiff has entered into with the defendant; but it is also a breach of faith with every one of the other creditors who were parties to the arrangement. It clearly, therefore, cannot be the subject of a cross-action, the damages in which would not be commensurate with the injury. A covenant between A. and B. not to sue for a limited time is not the proper subject of a plea in bar; but if the deed declares the debt to be forfeited if sued for within the time, and enables the debtor to plead it, it does operate as a bar. This is distinctly laid down in 1 Roll. Abr. 939, tit. Extinguishment (L), pl. 1, 2: "Si l'obligee covenant ave l'obligor que est lie a performer covenants, nemy a luy molester ou suer luy devant tiel jour, ceo nest aucun suspension del dett, car le proper sence del paroll est d'aver covenant sur ceo sil luy sue devant le jour, et nemy a faire ceo un releas. Si l'obligee grant al obligor quil ne serra sue nec vex sur le dit obligation devant tiel jour, et sil soit, que donque il pledera le dit grant come un acquittance, et que le dit obligation serra void et de nul effect, ceo est un suspension del obligation, et assint per consequens un releas, — car ceo est un grant, — et que il ceo pledera come un acquittance."

There is a singular diversity in the reports of *Ayloff v. Scrimshire*. In the reports in Carthew and in Salkeld it is stated simply as a covenant not to sue for a limited time. In the former, the very case now before the court is put in the most pointed manner: "*Nota*. In the argument of this case it was allowed by all that a letter of license containing the words following, namely, that if the creditor sue, &c., within such a time, that his debt shall be forfeited, such license is pleadable in bar; therefore, in the principal case, the covenant being temporary and limited to a certain time, and there being no words in the deed of defeasance to make the debt forfeited upon a suit commenced, &c., the court was clear in opinion it was not pleadable in bar, but that an action of covenant was his proper remedy." In Comberbach the report runs thus: The defendant pleaded that the plaintiff, after the money was due on the bond, covenanted and granted by indenture not to sue the defendant in ninety-nine years; to which the plaintiff demurred. And Holt, C. J., said, "that the suspension of this action will not destroy the bond, for every defeasance is *quodammodo* a suspension; that a covenant not to sue at all is an acquittance, but a covenant not to sue a bond within such a time, goes only in covenant; that the rule that a personal action once suspended is forever extinct doth not hold in all cases." And Dolben agreed. Shower,

time, is precluded and gone forever. It could only be pleaded in bar; for that is its legal operation. To have allowed the agreement in Ford

in his report of *Carivil v. Edwards*, 1 Show. 330, concludes with an *adjournatur*, and he does not in his argument cite *Ayloff v. Scrimshire*, which occurred but two years before, and which as reported by himself, was, if correct, a distinct authority in his favor. *Tatlock v. Smith*, 6 Bingh. 339, 3 M. & P. 676, is a very strong authority in favor of the defendant. There, by an agreement between the defendants and their creditors, all the defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estates, in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business, and paid the creditors 10s. in the pound; they then tendered for execution by the defendants a conveyance of all their estate, containing a clause of release which the defendants objected to as insufficient, and refused to execute the conveyance; the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute was adjourned in order that the signature of every creditor might be obtained; and it was held that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least until the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. *Richardson v. Rickman*, B. R., M. 16 G. 3, is cited in *Kearslake v. Morgan*, 5 T. R. 517, as the first case in which it was held that the giving a negotiable instrument was pleadable in bar. In 2 Wms. Saund. 103 b, it is said: "It has been established by modern authorities that the acceptance of a negotiable note or bill 'for and on account' of a debt, must be taken *prima facie* to be in satisfaction of that debt, until it appears that the note or bill remains unpaid in the possession of the creditor, without any laches by him. *Kearslake v. Morgan*; *Burden v. Halton*, 4 Bingh. 454; 1 M. & P. 223; *Kendrick v. Lomax*, 2 C. & J. 405; *Mercer v. Cheese*, 4 M. & G. 804; 5 Scott, N. R. 664. It is usually said that the taking of the note or bill suspends the creditor's remedy for the time it has to run; for that it amounts to an agreement by him not to sue for that time in consideration of the debtor's giving the note or bill. See *Simon v. Lloyd*, 2 C. M. & R. 187, 189; 3 Dowl. P. C. 813. It may be observed, however, that where the obligee of a bond even expressly covenants not to sue for a certain time, this cannot be pleaded in bar of an action on the bond, but is a covenant only, for a breach of which the obligor may bring his action. *Ayloff v. Scrimshire*, Carth. 63; 1 Show. 46; Comb. 123; 2 Salk. 573. And the reason seems to be, that if such covenants were allowed to operate in suspension of the action, the right of action would be altogether lost; inasmuch as it is a rule that where a personal action is once suspended by the voluntary act of the party, it is forever gone, and discharged. *Fryer v. Gildridge*, Hobart, 10; *Dorchester v. Webb*, Cro. Car. 372; *Wankford v. Wankford*, 1 Salk. 302, 303. In truth, then, this abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as part of the law-merchant, in respect of mercantile securities. *Owen v. Griffiths*, Exch. T. T. 1844. The difficulty of reconciling the doctrine with any principle is increased by the courts' having declined to apply it to the case of a debt due for rent, — *Davis v. Gyde*, 2 Ad. & E. 623; 4 N. & M. 462, — or on a specialty. *Worthington v. Wigley*, 3 N. C. 454; 3 Scott, 558." [V. WILLIAMS, J. — Is not the plea an answer, as setting up a new agreement, as in *Good v. Cheeseman*, 2 B. & Ad. 328. That gets over the difficulty as to accord and satisfaction.] It is submitted that the plea may be upheld in that view also. [V. WILLIAMS, J. — Can there, in strictness, be a reservation of liberty to plead a thing in bar which is not a release? In *Dean v. Newhall*, 8 T. R., 168, it was held that if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. MAULE, J. — Here the proviso that in the event of molestation the covenant may be pleaded in bar seems designed merely to expound the former part, showing that it was intended in the sense in which it would furnish a bar.]

Willes, in reply. *Good v. Cheeseman* is altogether inapplicable to the view pre-

v. Beech to be pleaded in bar as a release would have been obviously contrary to the intention of the parties; and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated. Here we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not to sue for a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action — which in the ordinary course would go on to judgment and execution — was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity that, if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of the parties. To extinguish the debt would manifestly be to defeat the whole intention of the deed. But upon what assumption is that ground

mented on the other side: this is not the simple case of a composition-deed. The passages cited from Rolle's Abridgment, as explained by a reference to the Year Books, show that the deed there supposed operated as an immediate release. Here, however, the plain and obvious intention of the parties was merely to suspend the remedy.

taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Co. Litt. referred to by my brother Maule, seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, namely, the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.¹

SECTION IV.

Accord and Satisfaction.

BLAKE'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1605.

[Reported in 6 Coke, 43 b.]

EDEN brought a writ of covenant against Blake, assignee of Price, and the breach was for not repairing of the house; the defendant pleaded an accord between him and the plaintiff, and execution thereof in *satisfactions and exonerations decastis reparationum predict'*, upon which the plaintiff demurred; which plea began in the Common Pleas, 3 Jac. Rot. 1033. And it was objected, that this action of covenant was founded on the deed, which could not be discharged but by matter of as high a nature, and not by any accord or matter *in pais*; for *nihil tam conveniens est naturali æquitati, ut unumquodque dissolvi eo ligamine quo ligatum est*. And it appears by all our books that neither arbitrament nor accord with satisfaction is a plea when the action is grounded on a deed. *Vide* 1 H. 7, 14 b., 33 H. 8, 51, 59 Dyer, 1 H. 5, 6, 7 (67) 45 E. 3, 46, 25 H. 8, Br. Det. 173, 2. When the action is in the realty, or mixed with the realty, accord with satisfaction is no plea; for accord with satisfaction is a bar for the personalty, and not of the realty, and when the personalty is mixed with the realty, it is no bar for the personalty; for *omne majus trahit ad se minus*. *Vide* 11 H. 7, 13 b. 13 H. 7, 20 a, b, in Wast, Cr. El. 357. So in a ravishment of

¹ V. WILLIAMS, J., delivered a brief concurring opinion and MAULE and TALFOURD, JJ., also concurred.

ward, *Quare impedit, etc.* But it was resolved by the whole court that the defendant's plea was good in the case at bar; for there is a difference, when a duty accrues by the deed in certainty, *tempore confectiois scripti*, as by covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty; but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea: as in the case at bar, the covenant doth not give the plaintiff at the time of the making of it any cause of action, but the wrong or default after in not repairing of the house, together with the deed, gives an action to recover damages for default of reparations. And forasmuch as the end of the action is but to have amends and damages in the personalty for this wrong, therefore amends and satisfaction given the plaintiff is a good plea. For the action is not merely grounded on the deed, but also on the deed and the wrong subsequent, which wrong is the cause of the action, and for which damages shall be recovered, as in 13 E. 4, 1 b, & 5 a, b, in trespass, the plaintiff recovered by verdict, the defendant brought attain against the plaintiff and petit jury, and one of the petit jury pleaded accord between the plaintiff and defendant and satisfaction, and held a good plea. For the writ of attain is not only grounded on the record, but on matter in fact also, for the supposition of the falsity in the oath is matter in fact. And in 35 H. 6, 30 a, in attain brought on false oath in appeal of Mayhem, one of the petit jury pleaded arbitrament between the plaintiff and defendant; and in all cases where arbitrament is a good plea accord with satisfaction is a good plea. *Vide* 6 H. 7, 10 a, b, acc'. And generally in all actions where damages only are to be recovered, arbitrament or accord with satisfaction is a good plea; as in an action of waste in the *tenuit*, where damages are only to be recovered; and so is the report of Serjeant Bendlowes to be understood; for, in an action of waste against lessee for years in the *tenet*, accord is no plea, as it hath been before said. So it is to be collected on the book of 35 H. 6, 30 a, that in appeal of Mayhem accord with satisfaction is a good plea, because in the same action damages are only to be recovered. And so is the general rule put in 6 E. 6 Dyer (2 Roll. Rep. 188, 9 Co. 78 a., Cr. Jac. 100), 75, in Andrews's case. *Vide* 47 E. 3, 20 b. Accord for a rent reserved on a lease for years, 7 E. 3, Issue 9, 10 H. 7, 4 a, 11 H. 7, 4.

ELIZABETH CASE v. JAMES BARBER.

IN THE KING'S BENCH, TRINITY TERM, 1681.

[Reported in *Thomas Raymond*, 450.]

THE plaintiff declares in an *indebitatus assumpsit* for £20 for meat, drink, washing, and lodging for the defendant's wife, provided for her at the request of the defendant, and lays it two other ways. The defendant pleads that after making the said promise, &c., and before for exhibiting the said bill, viz., such a day, it was agreed between the plaintiff and the defendant, and one Jacob Barber his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiff should accept the said Jacob, the son, for her debtor for £9, to be paid as soon as the said Jacob should receive his pay due from his Majesty, as lieutenant of the ship called the "Happy Return," in full satisfaction and discharge of the premises in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes, and that she accepted the said Jacob, the son, her debtor for the said £9, and that the said son agreed to pay the same to the plaintiff accordingly; and that the said Jacob afterwards, and as soon as he received his pay as aforesaid, viz., 27 April, 32 Car. 2, was ready, and offered to pay the said £9, and the plaintiff refused to receive it; and that the said Jacob hath always since been, and still is ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus, &c.* The plaintiff demurs. And it is alleged by the defendant's counsel that the plea is good; for though in *Peyto's case*, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 b, 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18 Car. B. R. *Palmer v. Lawson*, ante. In *indebitatus assumpsit* against an executor upon a contract made by the testator, the defendant pleads judgment in debt upon simple contract against him for the debt of the testator, and after argument resolved a good plea; because, though in debt against an executor upon a simple contract the defendant may demur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so *Vaughan, Rep. Dee v. Edgcomb*.

But in this case at bar judgment was given for the plaintiff for two reasons:—

1. Because it doth not appear that there is any consideration that

the son should pay the £9, but only an agreement without any consideration.

2. Admit the agreement would bind, yet now by the statute of frauds and perjuries, 29 Car. 2, this agreement ought to be in writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

ALLEN v. HARRIS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1701.

[Reported in 1 Lord Raymond, 122.]

TROVER for a waistcoat. The defendant pleads that the plaintiff, in consideration that the defendant at the special instance of the plaintiff assumed to pay to the plaintiff 20s., agreed to discharge the defendant of this trover, &c., and lays mutual promises to perform, &c. The plaintiff demurs. *Girdler*, sergeant, for the defendant. The old rule was, that an accord with satisfaction ought to be pleaded executed, that the plaintiff might be sure of something for his damages; but an arbitrament may be pleaded without performance, because the parties may have reciprocal remedies. Then it being now settled, that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed, because each party may have his remedy. *T. Jones*, 158; *Raym.* 450, *Case v. Barber*; *T. Jones*, 168, *Wickham v. Taylor*. *Sed non allocatur*. For, *per curiam*, if arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies.¹ And the books are so numerous that an accord ought to be executed that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration.

Judgment for the plaintiff.

FORD v. BEECH.

IN THE EXCHEQUER CHAMBER, NOV. 26, 1847—FEB. 3, 1848.

[Reported in 11 Queen's Bench, 852.]

THE verdict was entered up as directed in the preceding judgment; and judgment was entered on the record, with a *consideratum est*.

¹ *Reeves v. Hearne*, 1 M. & W. 323; *Elliott v. Dasey*, 3 T. B. Mon. 268, *acc.*

“that the plaintiff take nothing by his said writ, but that he be in mercy, &c., and that the defendant go thereof without day,” &c., with costs for defendant against plaintiff, and award of execution thereof.

The plaintiff brought error in the Exchequer Chamber, assigning for error generally that judgment ought to have been given for the plaintiff, and also that judgment ought to have been given for the plaintiff “by reason of the non-performance by the said William Beech of the promise in the said third count of the said declaration mentioned; that the said finding of the said jury on the said eighth issue joined between,” &c., amounts to a finding in favor of the said John Ford, and that judgment ought to have been given accordingly; that the said finding is imperfect, uncertain, and argumentative, and does not dispose of the whole of the said issue, and that no judgment can be given thereupon, or in respect thereof, or upon the said record and proceedings;” that the fifth and sixth pleas “are not, nor is either of them, sufficient to bar the plaintiff from having or maintaining his action as to the causes of action to which those pleas are respectively pleaded; that the said pleas show an accord only without satisfaction, or with only partial satisfaction; that the said pleas attempt to set up, as a defence to the causes of action to which they are pleaded, an accord and satisfaction by a stranger to those causes of action; that the said pleas attempt to set up, as an answer to the causes,” &c., “the payment of a less sum than the amount which they profess respectively to answer.” Joinder.

Pashley, for the plaintiff in error.

Unthank, *contra*.

PARKE, B., in this vacation (February 8d) delivered the judgment of the court.

This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in *assumpsit*, and contained five counts. The first count is upon a promissory note, dated 28th May, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded to the first count that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed between the plaintiff, the defendant, and one Alfred

Beech that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200, for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum of £6 5s. every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the agreement. The plaintiff in his replication to this plea traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25; and a verdict was found for the defendant upon the issue joined upon that traverse. And judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, *non obstante veredicto* upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and that the plea which sets up the agreement in bar of the present action is bad, and furnishes no answer to the action, although such an agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the court is, therefore, what is the legal effect of the agreement between the parties set forth in the plea, — that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments, or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be col-

lected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in *Platt v. The Sheriffs of London, Plowd.* 35, 36: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge forever." And in *Lord North v. Butts*, 2 Dyer, 139 b, 140 a (39), it is said: "A thing personal or suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in *Woodward v. Lord Darcy, Plowd.* 184, it is said: "For a personal action once suspended by the act or agreement of the party is always extinct; and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text-books of authority, and recognized and applied through a long course of decision. And in *Cheetham v. Ward*, 1 Bos. & P. 630, 633, it is said by Lord Chief Justice Eyre that the principle is "now acknowledged that where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word "suspended," used in the agreement, would be contrary to the intention of the parties; and it is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction.

A few authorities will suffice in support of this principle. In commenting upon *Littleton*, § 560, — where *Littleton* says, "If there be lord and tenant, and the tenant grant the tenements to a man for

term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee," "the services are put in suspense during his life; but the heirs of the tenant for life shall have the services after his decease," — Lord Coke, in 313 a, says: "It is to be observed that, albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties, as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disinherited of the rent; and therefore Littleton here saith that the heirs of the grantee shall have the seignior after his death." In the present case, if the agreement operates as a release by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release; and in Co. Litt. 264 b, it is said: "A release in law shall be expounded more favorable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself." The general rules of law for the construction of instruments are clearly laid down by Willes, C. J., in *Parkhurst v. Smith*, lessee of *Dormer*, Willes, 327, 332, and which is to the effect that greater regard is to be had to the intention than to the precise words; and this rule is said to have the authority of Littleton, Plowden, Coke, Hobart, and Finch. This principle is recognized and adopted by Gibbs, C. J., in *Hutton v. Eyre*, 6 Taunt. 289, 295, s. c. 1 Marsh. 603, 607; and it is also stated and applied by Dallas, C. J., and various authorities referred to, in *Solly v. Forbes*, 2 Br. & B., 38, 48, wherein he states, as the result of modern authority, that the courts look "rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former;" and he observes that, if a deed can "operate two ways, one consistent with the intent and the other repugnant to it, courts will be ever astute so to construe it as to give effect to the intent," regard being had to "the entire deed;" and remarks upon the fallacy of assuming that, "wherever the word 'release' is made use of, it must operate absolutely and unconditionally," though followed by words of qualification.

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was, not to suspend his right of action in the mean time, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books being

where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue, as to which the authorities are numerous. See Co. Litt. 264 b, also Butler's note, *ib.* 209; *Woodward v. Lord Darcy*, Plowd. 184; Sir J. Nedham's case, 8 Rep. 135 a; *Dorchester v. Webb*, Cro. Car. 372; *Wankford v. Wankford*, 1 Salk. 299; *Freakley v. Fox*, 9 B. & C. 130; 2 Williams on Executors, 1124 (4th ed.).

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release (note (1) to *Fowell v. Forrest*, 2 Wms. Saund. 47 *gg*), for the reason assigned that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (*Smith v. Mapleback*, 1 T. R. 441, 446) or sum to be recovered in the action agreed to be forborne. Accordingly, in *Deux v. Jefferies*, Cro. Eliz. 352, in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas; it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to sue, and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." And there are other authorities to the like effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect; and, in the modern case of *Thimbleby v. Barron*, 3 M. & W. 210, it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not before the expiration of ten years demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord Abinger, C. B., said: "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar;" and Parke, B., said: "The books are full of authorities" against the defendant, and referred to *Ayloff v. Scrimshire*, Carth. 63, s. c. 1 Show. 46: judgment for plaintiff. In 1 Roll. Abr. 939, tit. Extinguishment (L), pl. 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release.

It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case therefore went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross-action to recover damages to the extent of the injury sustained by the defendant by the the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions: *Smith v. Mapleback*, 1 T. R. 441, 446; which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law-merchant. See note (c) to *Holdipp v. Otway*, 2 Wms. Saund. 103 b (6th ed.).

The case of *Stracey v. The Bank of England*, 6 Bing. 754, was cited on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock to which the plaintiffs were entitled; the defendants insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts; and alleged that the plaintiffs, contrary to their agreement, made the request, for the non-compliance with which they brought their action, before they had done those acts; the defendants therefore contended that such non-compliance was no

breach of duty on their part. There was no right of action suspended by the agreement, as it is clear from the case that no request had ever been made to the bank to transfer the stock, and no means had ever been given to enable the bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards; consequently the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of suspending an action was used, perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent without an undoubted principle of law and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, *non obstante veredicto*, upon the confession and insufficient avoidance in the plea.

Judgment accordingly.

SLATER v. JONES.

CAPES v. BALL.

IN THE EXCHEQUER, APRIL 28, 1878.

[*Reported in Law Reports, 8 Exchequer, 186.*]

KELLY, C. B.¹ I am of opinion that the defendants in these actions are entitled to our judgment. The question raised in each is the same, and is whether a creditor who is bound by a resolution to accept a composition to be paid by instalments or at a future time by a debtor, passed in conformity with the 126th section of the Bankruptcy Act, 1869, can sue the debtor for his whole debt before the time has come for the payment of any instalment, or of the composition.

Now, much stress has been laid upon the cases decided under the Bankruptcy Act of 1861; but there is a fundamental distinction between the provisions of that Act and of the present Bankruptcy Act. Under the former statute a prescribed majority of creditors could bind all to the provisions of any composition deed to which such majority should agree, and all that the 192d section enacts is that the deed, whatever its provisions, should, upon certain conditions being com-

¹ MARTIN, BRAMWELL, and POLLOCK, BB., delivered concurrent opinions.

plied with, bind all the creditors. The effect of each deed must of course be considered by itself. In one, provisions might be inserted amounting to an absolute extinction of the debt; in another, there might be no words having that effect; and if the intention of the parties was that the deed should be a bar, it was necessary to express it in plain words. That being so, I think the courts rightly decided that in construing those deeds the ordinary rules of law must be applied, and the intention of the parties be gathered from the words used; and, applying those rules, it was properly held that a deed which did not contain a release, or words equivalent to a release, could not be pleaded. But by the present law the machinery of arrangement is entirely altered. Compositions are no longer carried out by deed, but by resolution; and we have to say what the true construction of the statute is. The matter depends upon the 126th section, which provides that the creditors may, by an extraordinary resolution, resolve, "That a composition shall be accepted in satisfaction of the debts due to them from the debtor." Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense, and certainly one which is not forced upon us by any of the decided cases. Here the creditors have become bound by a resolution that a composition to be paid by instalments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made. This construction receives confirmation from many of the cases cited, and especially from those referred to by my Brother BRAMWELL, and collected in the 2d Volume of Starkie on Evidence, p. 17, whence it appears that an agreement by all the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement for which the consideration to each creditor is the forbearance of all the others. A creditor who is party to such an agreement cannot sue for his original debt in contravention of the rights of the others.

It remains to add a few words on the cases of *Edwards v. Coombe*, Law Rep. 7 C. P. 519, and *In re Hatton*, Law Rep. 7 Ch. 723. With regard to the latter, I do not dissent in any way from the decision. The general expressions used by MELLISH, L. J., must be taken *secundum subjectam materiem*; and do not seem to me to be applicable to a case where there has been no default in paying the agreed composition. The same remark is applicable to the judgment of WILLES, J., in *Edwards v. Coombe*, *supra*. Indeed, it is clear, from the language of the earlier part of his judgment, that he was of opinion that no action could have been maintained until default.

Then it is contended that the case of *Ford v. Beech*, 11 Q. B. 852, 17 L. J. Q. B. 114, interposes an insurmountable difficulty in the debtors' way; for if the composition resolution is a good bar now, the

right of action for the debt would be gone forever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. *Ford v. Beech*, *supra*, however, has no application here. For all that it is necessary to decide is that although, *rebus sic stantibus*, the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them; and *Edwards v. Coombe*, *supra*, evidently contemplates that such may be the case. I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for the debt, and yet the same debt could afterwards be sued for if the certificate were set aside for fraud; or again, just as no action can be successfully brought for the price of goods for which a bill of exchange has been given whilst the bill is running, and yet the price can be sued for after the bill has been dishonored.

*Judgment for the defendants in each action.*¹

¹ In *Newington v. Levy*, L. R. 5 C. P. 607, an action against the acceptor of a bill of exchange, the question was raised whether a composition deed, which provided for a future payment by the debtor and released him, but provided that if default were made in paying the composition the creditors should not be bound by any of their covenants, would operate as a defence if payment or tender of the amount of the composition were not made when it was due. *WILLES, J.*, said: "We see no difficulty in upholding a release with a condition subsequent, in accordance with the suggestion of *MAULE, J.*, in *Gibbons v. Vouillon*, 8 C. B. 487. It must have often happened that a voluntary payment good at the time as extinguishing the debt has been rendered void by matter subsequent, as in the event of bankruptcy of the debtor and an election by his assignees to treat the payment as a fraudulent preference; and it has never been successfully contended that the debt did not thereby revive. Indeed, the contrary is involved in the decision of *Pritchard v. Hitchcock*, 6 M. & G. 151. We can see no substantial distinction between the case of a payment avoided by subsequent events and a release so avoided. This is not a case of temporary suspension, like *Ford v. Beech*, 11 Q. B. 852; but a case in which the release will be forever operative, unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties."

On appeal the Court of Exchequer Chamber affirmed the judgment below, L. R. 6 C. P. 180. *BLACKBURN, J.*, said: "The first question that arises is, what is the effect of the release in the deed of composition pleaded in the first action? By that deed the creditors release the defendant from their respective debts in express terms; and in equally express terms it is declared that, if default should be made in payment of the composition, the release should be void. The question (which has never yet arisen in a court of error) is, whether this is pleadable as a defence, where the matter which is to undo the release has not yet happened. I think it is. The old rule was that a right of action once suspended is gone forever. To avoid that, where it was evidently contrary to what the parties intended, the Court of Exchequer Chamber, in *Ford v. Beech*, 11 Q. B. 852, construed the agreement, not as suspending the plaintiff's remedy on the promissory notes there sued upon, but as giving the defendant merely a right of action for breach thereof, if the plaintiff sued whilst the payments were continued, that is, as a covenant not to sue for a limited period. It must, however, be taken to be established that, where a covenant not to sue is in terms expressed to be intended as a release, and where the rights of a surety do not intervene, it is, in order to avoid circuity of action, an answer to the plaintiff's claim. A release which in terms is subject to a defeasance amounts to a covenant not to sue, except upon the happening of the event contemplated. Such a release is not open to

HARBOR v. MORGAN.

INDIANA SUPREME COURT, MAY 30, 1853.

[Reported in 4 Indiana, 158.]

STUART, J.¹ Assumpsit on a note due October 1, 1849, payable in money or wheat, at the customary price at Fairview, in said county. Breach, that the defendant had failed to pay the money, or in anywise comply with the conditions of said note.

The third plea alleges an agreement made in December, 1849, between Jernagan, the holder of the note, and the defendant below, to the effect that if Harbor would procure for the defendant a certain pacing horse which was specified, he, Jernagan, would accept, and receive the horse instead of the wheat, in payment of the note. And Harbor avers that he purchased the horse and sent him to Jernagan; but that the latter refused to receive him, &c.

This plea is also bad. It lacks the acceptance of Jernagan to make it a bar to the action.² Perhaps Harbor may have a remedy against Jernagan on the collateral agreement.

GOOD v. CHEESMAN.

IN THE KING'S BENCH, MAY 4, 1831.

[Reported in 2 Barnewall & Adolphus, 328.]

ASSUMPSIT by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before LORD TENTERDEN, C. J., at the sittings in London after Trinity Term, 1830, it was proved, on behalf of defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three

the objection taken in *Ford v. Beech*, *supra*. It very rarely could happen that matter subsequent could undo that which had suspended the plaintiff's right of action, and therefore practically it was enough to say that a right of action once suspended is gone forever; and I am not surprised that the research of Mr. Williams has failed to enable him to find an instance of such a replication as this. But, where there is a covenant not to sue which is pleadable as a defence only to prevent a cross-action, anything which would have been an answer to the cross-action upon the covenant may be set up as an answer to the plea; as in the case of *Eyton v. Littledale*, 4 Ex. 159, 18 L. J. (Ex.) 369, where it was held to be a good replication to a plea of set-off, that after plea pleaded the plaintiff paid the debt."

See also *ex parte Burden*, 16 Ch. D. 675.

¹ A portion of the opinion is omitted.

² *Wray v. Milestone*, 5 M. & W. 21; *Francis v. Deming*, 59 Conn. 108; *Burgess v. Denison Mfg. Co.*, 79 Me. 266; *Cannon Rivers Assoc. v. Rogers*, 46 Minn. 376; *Hawley v. Foote*, 19 Wend. 516; *Keen v. Vaughan's Ex.*, 48 Pa. St. 477, *acc.*

other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum: "Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829." It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional 20*l.* per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows: "If you should see Mr. Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavor to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule *nisi* having been obtained accordingly, —

Scotland now showed cause.

Follett, contra.

LORD TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in

consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is it not a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor, — the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks*, 2 T. R. 24. And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in *Com. Dig. Accord* (B 4.), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

*Rule discharged.*¹

BABCOCK & RUSSELL v. PETER HAWKINS.

VERMONT SUPREME COURT, AUGUST TERM, 1851.

[Reported in 23 Vermont, 561.]

BOOK account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows: The plaintiffs exhibited an account against the defendant, only one item of which was disputed, which was for a horse, charged by the plaintiff at \$60, and which was allowed by the auditor at \$52.50. The whole account was allowed by the auditor at \$323.16. The plaintiffs exhibited credits to the amount of \$285.87, which included a credit for a note for \$30, given by the defendant to the plaintiffs August 14, 1849, and the defendant claimed and was allowed an account of 75 cents; and the auditor reported that there was a balance due from the defendant to the plaintiffs of \$31.68, which they were entitled to recover, unless the facts hereinafter stated, which were relied upon by the defendant, would in law preclude the plaintiffs from any right of recovery. It appeared that on the 14th of August, 1849, which was subsequent to the commencement of this suit, the parties met, and the defendant agreed to give a note for \$30 to the plaintiffs, and pay all the plaintiffs' costs in the suit, except the writ and service. The defendant executed the note, — which is the one credited to him by the plaintiffs as above stated, — and agreed to pay the costs as above stated; and the plaintiffs then executed and delivered to him a receipt in these words: "Received of Peter Hawkins thirty dollars by note given per this date in full to settle all book accounts up to this date;" and the suit, as well as the subject-matter of the suit, was considered settled by the parties. The defendant never paid any portion of the costs, but paid part of the note, and for the reason that the defendant had not paid the costs the plaintiffs refused to discontinue the suit. The county court, February Adjourned Term, 1851, Poland, J., presiding, accepted the report and rendered judgment for the defendant. Exceptions by plaintiffs.

G. W. Stone and J. McLean, for plaintiffs.

T. Howard, for defendant.

The opinion of the court was delivered by

REDFIELD, J. There is perhaps no subject connected with the law upon which there has been more discussion than that of accord and

¹ Compare Evans v. Powis, 1 Ex. 601.

satisfaction, or upon which there is more want of agreement. But we think it must be regarded as fully settled that an agreement upon sufficient consideration, fully executed, so as to have operated, in the minds of the parties, as a full satisfaction and settlement of a pre-existing contract or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law.

1. There is no want of consideration in any such case where one contract is substituted for another, and especially so where the amount due upon the former contract or account is matter of dispute. The liquidating a disputed claim is always a sufficient consideration for a new promise. *Holcomb v. Stimpson*, 8 Vt. 141.

2. The accord is sufficiently executed, when all is done, which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability in the present tense. That is shown in the present case by executing a receipt in full, the same as if the old contract had been upon note or bill and the papers had been surrendered.

3. In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract. And in the present case, as it is obvious to us that the plaintiffs agreed to accept the note and the defendant's promise to pay the costs in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract.

4. In all cases where the party intends to retain his former remedy he will neither surrender nor release it; and whether the party shall be permitted to sue upon his original contract is matter of intention always, unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract.

5. In every case of a valid contract, upon sufficient consideration, to discharge a former contract in some new mode, the new contract supercedes the remedy for the time, until there has been a failure; and then the creditor may always, if he chooses, sue upon the new contract. This is certainly the inclination of the more modern cases.

We think the judgment must be affirmed.¹

¹ The possibility of the executory accord being itself accepted as satisfaction is now generally recognized.

Evans v. Powis, 1 Ex. 601; *Buttigieg v. Booker*, 9 C. B. 689; *Edwards v. Hancher*,

OTTO KROMER v. ANTON HEIM.

NEW YORK COURT OF APPEALS, DECEMBER 5, 1878 — JANUARY
21, 1879.

[Reported in 75 *New York*, 574.]

APPEAL from order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24, 1876, the plaintiff obtained a judgment herein for \$4,334.08. On July 26, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, \$3,000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept \$1,000 in cash, \$250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to \$1,000, and an assignment of said patent interests. Defendant paid the \$250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than \$1,000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

D. M. Porter, for appellant.

J. W. Feeter, for respondent.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. tit. Accord and Satisfaction, C. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed, to sustain a plea of accord and satisfaction. Bac. Abr. Accord

1 C. P. D. 111, 119; *Acker v. Bender*, 33 Ala. 230; *Smith v. Elrod*, 122 Ala. 269; *Heath v. Vaughn*, 11 Col. App. 384; *Warren v. Skinner*, 20 Conn. 356; *Goodrich v. Stanley*, 24 Conn. 613; *Brunswick, &c. Ry. Co. v. Clem*, 80 Ga. 534; *Simmons v. Clark*, 56 Ill. 96; *Hall v. Smith*, 10 Iowa, 45, 15 Iowa, 584; *Whitney v. Cook*, 53 Miss. 551; *Yazoo, &c. R. Co. v. Fulton*, 71 Miss. 385; *Worden v. Houston*, 92 Mo. App. 371; *Gerhart Realty Co. v. Northern Assur. Co.*, 94 Mo. App. 356; *Frick v. Joseph*, 2 N. Mex. 138; *Perdew v. Tillma*, 62 Neb. 865; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Nassoiy v. Tomlinson*, 148 N. Y. 326; *Spier v. Hyde*, 78 N. Y. App. Div. 151. Compare *Campbell v. Hurd*, 74 Hun, 235; *Wents v. Meyersohn*, 59 N. Y. App. Div. 130; *Hosler v. Hursh*, 151 Pa. 415.

Satisfaction, A ; *Cock v. Honeychurch*, T. Ray. 203 ; *Allen v. Harris*, 1 Ld. Ray. 122 ; *Lynn v. Bruce*, 2 H. Bl. 317. In *Peytoe's case*, 9 Co. 79, it is said, "and every accord ought to be full, perfect, and complete ; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. *Evans v. Powis*, 1 Ex. 601 ; *Kinsler v. Pope*, 5 Strob. 126 ; *Pars. on Cont.* 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors ; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. *Good v. Cheesman*, 2 B. & Ad. 328 ; *Bayley v. Homan*, 3 Bing. N. C. 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord ; and the original obligation remains in force. *Russell v. Lytle*, 6 Wend. 390 ; *Daniels v. Halenbeck*, 19 id. 408 ; *Hawley v. Foote*, id. 516 ; *The Brooklyn Bank v. DeGrauw*, 23 id. 342 ; *Tilton v. Alcott*, 16 Barb. 598.

Applying the well settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was, in effect, a proposition on the part of the plaintiff, in the alternative, to accept \$3,000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of \$4,334.08, or to accept \$1,000 in cash, in instalments, and the balance in merchandise, until the judgment should be reduced to \$1,000 ; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the \$1,000, and supplied the merchandise, until the debt was reduced to \$1,000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord

partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered; and he had the legal right to enforce the judgment for the balance remaining unpaid.¹

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay \$3,000 in cash, and assign the patent interests, or to pay \$3,334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay \$3,334.08 in merchandise to paying \$3,000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed.

All concur.

Order affirmed.

HENRY HUNT v. WILLIAM BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 13—
MARCH 2, 1888.

[Reported in 146 Massachusetts, 253.]

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that, if the plaintiff would assent to a compromise, by the executors of the plaintiff's father's will, of a

¹ *Shepherd v. Lewis*, T. Jones, 6; *Lynn v. Bruce*, 2 H. Bl. 317; *Carter v. Wormald*, 1 Ex. 81; *Gabriel v. Dresser*, 15 C. B. 622; *Humphreys v. Third Nat. Bank*, 75 Fed. Rep. 852, 859; *Long v. Scanlan*, 105 Ga. 424; *Woodruff v. Dobbins*, 7 Blackf. 582; *Deweese v. Cheek*, 35 Ind. 514; *Young v. Jones*, 64 Me. 563; *White v. Gray*, 68 Me. 579; *Clifton v. Litchfield*, 106 Mass. 34; *Hayes v. Allen*, 160 Mass. 34; *Prest v. Cole*, 183 Mass. 283; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 549; *Clarke v. Dinmore*, 5 N. H. 136; *Rochester v. Whitehouse*, 15 N. H. 468; *Kidder v. Kidder*, 53 N. H. 561; *Gowing v. Thomas*, 67 N. H. 399; *Russell v. Lytle*, 6 Wend. 390; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Tilton v. Alcott*, 16 Barb. 598; *Hearn v. Kiehl*, 38 Pa. 147; *Blackburn v. Ormsby*, 41 Pa. 97; *Hosler v. Hursh*, 151 Pa. 415; *Clarke v. Hawkins*, 5 R. I. 219; *Carpenter v. Chicago, &c. Ry. Co.*, 7 S. Dak. 594; *Gleason v. Allen*, 27 Vt. 364, acc.

Bradley v. Gregory, 2 Camp. 383; *Very v. Levy*, 13 How. 345; *Latapee v. Pechohier*, 2 Wash. C. C. 180; *Whitsett v. Clayton*, 5 Col. 476; *Jenness v. Lane*, 26 Me. 475 (overruled); *Heirn v. Carron*, 19 Miss. 361; *Coit v. Houston*, 3 Johns. Cas. 243 (overruled); *Bradshaw v. Davis*, 12 Tex. 336; *Johnson v. Portwood*, 89 Tex. 235, 239, *contra*.

claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for sixty-two per cent of the amount, with the plaintiff's assent. Then Russell died, and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused, and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration, that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent, and that if it was so dealt with it was sufficient. Evidence or even an admission that the compromise was for the plaintiff's advantage would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as a consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone, it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

2. If Russell had received the sixty-two per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction; *Bowker v. Childs*, 3 Allen, 434, 436; and if it was technically a satisfaction, whether, like a payment (*Fuller v. Shattuck*, 13 Gray, 70), it must not have been pleaded in the suit upon the notes if it was to be relied on at all, or whether there remained any contract unexecuted by the party satisfied which he would break if he afterwards brought suit. But Russell did not accept the sixty-two per cent; so that the only question is whether his agreement in any other way extinguished the notes in whole or in part, since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of thirty-eight per cent of the notes, when the percentage was fixed by the compro-

mise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. *Goodnow v. Smith*, 18 Pick. 414, 416; *Petty v. Allen*, 134 Mass. 265, 267; *Taylor v. Manners*, L. R. 1 Ch. 48. But the common law knows no such release. *Shaw v. Pratt*, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See *Cumber v. Wane*, 1 Smith's Lead. Cas. (8th Am. ed.) 633 and notes; *Bragg v. Danielson*, 141 Mass. 195, 196; *May v. King*, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired, in satisfaction of thirty-eight per cent of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement, and what was done under it, had released or satisfied thirty-eight per cent, they were warranted at least equally in finding that it was purely executory in purport as well as in form, viz. to accept a percentage in satisfaction when it was paid. The court could not rule, as matter of law, that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said, that the contract must have been found to embrace the element that Russell would not sue for more than sixty-two per cent. And it may be argued, that, if not technically a release, it ought to have been available in defence *pro tanto*, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to sue is allowed to enure as a release. The answer is, that whether available in this way or not, whether or not such a defence would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defence. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral contract. See further *Costello v. Cady*, 102 Mass. 140; *Blake v. Blake*, 110 Mass. 202. A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. *Smith v. Palmer*, 6 Cush. 513, 521; *Cobb v. Curtiss*, 8 Johns. 470. See *Burnett v. Smith*, 4 Gray, 50, 52; *Davis v. Hedges*, L. R. 6 Q. B. 687.

When a defendant has the choice of setting up a matter in defence, or of suing upon it in another action, if he chooses not to set it up in defence, of course the judgment in the action against him is no bar to a subsequent suit by him. *Smith v. Palmer*, *ubi supra*; *Star Glass*

Co. v. Morey, 108 Mass. 570, 573; *Davis v. Hedges*, *ubi supra*. Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. *Ulsch v. Muller*, 143 Mass. 379; *Grinnell v. Spink*, 128 Mass. 25. The present plaintiff, not having set up the agreement, and having no other defence, very properly saved himself costs and his antagonist delay by submitting at once to the inevitable and offering judgment. See *Rigge v. Burbidge*, 15 M. & W. 598.

Exceptions overruled.

In Re HATTON.

IN CHANCERY, JULY 25, 1872.

[Reported in 7 *Chancery Appeals*, 723.]

GEORGE HATTON, on the 24th of March, 1871, filed his petition for liquidation or composition with his creditors, and at the first meeting of creditors the following resolutions were passed: "1. That a composition of 5s. in the pound shall be accepted in satisfaction of the debts due to the creditors from the said George Hatton; 2. that such composition be payable as follows: 2s. 6d. in the pound three months after registration of this resolution, and 2s. 6d. in the pound six months after registration;" which resolutions were duly confirmed and registered.

Messrs. Hodge & Co., as creditors of Hatton, assented to the resolutions, and received the first instalment of £5 18s. 9d. on their debt of £47 10s.

The second instalment became due on the 26th of October, 1871, but was not paid; and Hatton now alleged that he was unable to pay it. Hodge & Co. applied for payment, and on the 30th of April, 1872, commenced an action in the Court of Common Pleas to recover a balance of £45 8s.

Hatton then sent them an order for £5 18s. 9d. as the second instalment, which they refused to receive.

Hatton then obtained from the Registrar, acting as Chief Judge in Bankruptcy, an injunction restraining Hodge & Co. from proceeding with their action until further order of the court.

Hodge & Co. now moved, by way of appeal, to discharge the order granting the injunction.

Mr. *De Gex*, Q. C., and Mr. *Bagley*, for the Appellants.

Mr. *Robertson Griffiths*, for Hatton.

SIR W. M. JAMES, L. J. I think that we are bound by the decision of the Court of Common Pleas in *Edwards v. Coombe*, Law Rep. 7 C. P. 519.

We find, indeed, a decision in *In re Hemingway*¹ which appears to

¹ Reported in 7 Ch. App. 724, n.

be conflicting with that decision, but there were peculiar circumstances in that case which may have had some influence upon the mind of the Chief Judge. Here, however, the question has resolved itself into the simplest form possible. If the debt continues to exist at common law, and it has been decided that the debt does continue so to exist, there is nothing in this case to induce us, as a Court of Equity, or a Court of Bankruptcy, to say that the debt does not exist in this court.

The act has provided that a certain majority of the creditors shall have power to bind every creditor to accept a composition, or something less than he is entitled to. In this case the creditor is to accept 5*s.* in the pound, payable by instalments, at three months and six months. It must be conceded that if this had been an agreement with any individual creditor, that agreement could not be pleaded as accord and satisfaction of the debt unless actual payment of the 5*s. modo et formâ* could also be pleaded; and I do not see why we are to suppose any difference between the two cases. It is true that the act has given not only power to make binding resolutions as to the composition, but power to the creditors to enforce in bankruptcy payment of the composition. That, however, amounts only to a further security, and does not alter the nature of the agreement. If the creditors had intended to make such an alteration, they might have said so. The resolution of the creditors might have provided that giving promissory notes, with or without sureties, should be accepted in discharge of the existing debts, and then the execution of the promissory notes by the debtor and the sureties might be pleaded as accord and satisfaction.

To give any other interpretation to the act would be to interfere with the general provisions of the act, and would in fact interfere with the ratable distribution of the assets, instead of having the contrary effect, as had been argued. It was said that the debtor might then be able to pay half his creditors, and leave the others unpaid, but that is entirely met by the provision at the end of the 126th section, enabling the court under such circumstances to adjudge the debtor a bankrupt. If the debtor applies great part of his assets in payment of some of his debts, any other creditor, seeing that the debtor would then not be able to pay him, can go to the Court of Bankruptcy and have the debtor adjudged bankrupt, so as to prevent that state of things.

It appears to me that the Court of Common Pleas has decided in accordance with my own view, that the composition must be paid pursuant to the agreement, as well as agreed to be paid, to give the debtor a valid defence to an action at law; nor is there any defence or any equity in this court. There may be cases in which by accident, and not by default of the debtor, the composition is not duly paid, and then no doubt this court would relieve the debtor from the effect of such an accident, and remove any injustice.

SIR G. MELLISH, L. J. I am of the same opinion. At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfac-

tion of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him. There is nothing in the act to alter this state of things. There may be, as in this case, a simple composition which the creditors agree to accept if paid to the day, and there is in my opinion no reason why we should construe these resolutions otherwise.

In a similar case, as I understand it, the Court of Common Pleas has held that the creditor could maintain his action for the full amount, and there is nothing to induce us in this case to restrain him. The only excuse given by the debtor is that he had not money with which to pay this instalment; but that, under the circumstances, is not a sufficient excuse; and it was not until the action was brought that the composition was tendered.

The order of the Registrar must be discharged. The creditors will have their costs below, but not of the appeal.¹

**MITCHELL AND ANOTHER v. HAWLEY, IMPEADED WITH FOOTE
AND TAYLOR.**

NEW YORK SUPREME COURT, MAY, 1847.

[*Reported in 4 Denio, 414.*]

DEBT on a justice's judgment on a note signed by Foote as principal and Hawley and Taylor as sureties. The defendant Hawley was not served with process in the justice's court, and he alone was served with process in the present action. He proved as a defence an agreement by the plaintiff with Taylor, made after the judgment in the justice's court was rendered, but before the time for appeal had expired, by which the defendant agreed not to issue execution against Taylor, or endeavor to collect the judgment from him, but to look solely to the other defendants, in consideration of Taylor's agreement not to appeal.

The circuit judge held that this agreement constituted no defence, and directed a verdict for the plaintiff, to which the defendant's counsel excepted.²

¹ See also *Simmons v. Oullahan*, 75 Cal. 508; *Francis v. Deming*, 59 Conn. 108; *Prest v. Cole*, 183 Mass. 283.

² The statement of facts has been abbreviated.

N. Hill, Jun., for the defendant Hawley, moved for a new trial on a case.

D. Wright, for the plaintiffs.

By the Court, BEARDSLEY, J. It was said in *James v. Henry*, 16 Johns. 238, "That a justice's judgment was equivalent, at least, to a specialty; and that assumpsit will not, therefore, lie on such a judgment." But, strictly speaking, the judgment of a justice, in a case of which he has jurisdiction, is much more than equivalent to a specialty, for that may be impeached on various grounds, as fraud or illegality. Such a judgment, however, while unreversed, is, for every purpose, as conclusive between the parties as that of the highest court of record in the State. *Pease v. Howard*, 14 Johns. 479; *Andrews v. Montgomery*, 19 id. 162.

The judgment declared on in this case, was in the nature of a debt of record; and although as to the defendant Hawley, who had not been served with process and who did not appear in the cause before the justice, the judgment was only evidence of the extent of the demand after establishing his liability by other evidence, it was as to the other defendants, who had been duly served with process, absolutely conclusive. 2 R. S. 247, §§ 122, 3; p. 251, §§ 141, 2; p. 377, § 1 to 5. So far, therefore, as respects the defendants Taylor and Foote, this judgment was equivalent to a debt of record; and if, as to the defendant Hawley, it should be regarded as a security of an inferior grade, that would not affect the decision to be made upon the questions now before the court.

A judgment may certainly be released. *Co. Lit.* 291, *a*; 2 *Shep. Touch.* by *Preston*, 322, 3; *Barber v. St. Quintin*, 12 *M. & W.* 452, *Parke, B.* But a release is always under seal, and here was none. *Rowley v. Stoddard*, 7 Johns. 207; *Co. Lit.* 264. In the present case there was nothing more than a parol agreement by the plaintiffs, founded on a like engagement by the defendant Taylor, that they would not take any proceedings on the judgment to collect the same of him, but would look to the other defendants alone for satisfaction thereof. This was in no sense a release, nor was the arrangement made between these parties valid, by way of accord and satisfaction.

It was an accord only, for nothing was received in satisfaction of the judgment. Taylor agreed not to carry the case to the common pleas by appeal, and the plaintiffs agreed not to enforce the judgment against him. So far everything rested on promises, for nothing whatever was executed by either party. An accord executory is in no case a bar. *Com. Dig. Accord*, B. 1, B. 4; *Vin. Ab. Accord*, A.; *Davis v. Ockham*, *Sty.* 245; *James v. David*, 5 *D. & E.* 141; *Lynn v. Bruce*, 2 *H. Black.* 317; *Bayley v. Homan*, 3 *Bing. N. C.* 915; *Allies v. Probyn*, 2 *C. M. & R.* 408; *Daniels v. Hallenbeck*, 19 *Wend.* 408; *Brooklyn Bank v. De Grauw*, 23 *id.* 342.

There is another insuperable difficulty in looking at this arrangement as an accord and satisfaction; for such a plea can, in no case,

be interposed as a bar to an action of debt founded on a record, or on a judgment in the nature of a record. "An obligation is not made void but by a release; for *naturale est quilibet dissolvè eo modo quo ligatur* — a record by a record, a deed by a deed; and a parol promise or agreement is dissolved by parol, and an act of parliament by an act of parliament. This reason and this rule of law are always of force in the common law." Jenk. Cent. p. 70. And this is strictly true with a single qualification, that a record, as well as a specialty, may be cancelled by a release. *Barber v. St. Quintin*, Parke, B., *supra*; *Broom's Legal Max.* 407; *Shep. Touch. supra*; 1 Saund. Pl. & Ev. 23; *West v. Blakeway*, 2 Scott's N. R. 199; 9 Dow, 846, s. c.

The principle stated applies as well to debts by specialty as to debts of record. But here a distinction is to be noted, for "when a duty doth accrue by the deed in certainty, *tempore confectiois scripti*, as by covenant, bill or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high nature, although that the duty be merely in the personalty: but when no certain duty accrues by the deed but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea." *Blake's Case*, 6 Rep. 43. Accord and satisfaction cannot discharge a specialty, although they will damages arising from the breach of a specialty. 1 Leigh's N. P. 694; 1 Chit. Pl. ed. 1837, 521, c; Com. Dig. Accord, A. 2, 4; Bac. Ab. Accord and Satisfaction, B.; Vin. Ab. Accord, B.; *Alden v. Blague*, Cro. Jac. 99; *Neal v. Sheaffield*, id. 254; *Kaye v. Waghorne*, 1 Taunt. 428; *Strang v. Holmes*, 7 Cowen, 224.

"Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Com. 15. The bar rests on the agreement and not on the mere reception of property, for whatever amount may have been received, the right of action will not be extinguished, unless it was agreed that the property should be received in satisfaction of the injury. 1 Saund. Pl. & Ev. 23 to 26; Bac. Abr. Accord and Satisfaction; 3 Steph. Com. 373; 1 Ch. Pl. 613; 2 id. 924, 1022, 1031, 1156; *Webb v. Weatherby*, 1 Bing. N. C. 502; *Ridley v. Tindall*, 7 Adol. & El. 134. But the agreement thus to accept satisfaction is by parol, which, in its nature, is capable of discharging an obligation by record or specialty — *quodque dissolvitur eodem ligamine quo ligatur*.

On the same principle, payment of a debt of record could not, at common law, be pleaded to an action brought for the recovery of such debt; 1 Ch. Pl. 521; 2 id. 996, a, note h.; 2 Saund. Pl. & Ev. 712, 713, 717; or of a debt by specialty. *Dyer*, 25, b. But it is otherwise by statute. 2 R. S. 353, §§ 11, 12, 13; 1 R. L. of 1813, p. 517, § 5.

The judgment on which this action was brought, not having been

cancelled or impaired as to either of the parties, by the arrangement between the plaintiffs and Taylor, no defence was shown on the trial, and the motion for a new trial must be denied.

*New trial denied.*¹

STEEDS AND ANOTHER v. STEEDS AND ANOTHER.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, FEBRUARY 4, 6, 1889.

[Reported in 22 Queen's Bench Division, 537.]

THE judgment of the court (Huddleston, B., and Wills, J.) was read by—
WILLS, J. The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favor by the two defendants.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. 1. That in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. 2. That even if it would be so, were the bond made in favor of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in

¹ In *Boffinger v. Tynes*, 120 U. S. 198, 205, Mr. JUSTICE MATTHEWS in delivering the opinion of the court, said: "The technical difficulty that there can be no satisfaction and discharge of a judgment or decree, except by matter of record, *Mitchell v. Hawley*, 4 Denio, 414; s. c. 47 Am. Dec. 260, cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have the same effect." See also *Re Freeman*, 117 Fed. Rep. 680, 684; *Savage v. Blanchard*, 148 Mass. 348; *Fowler v. Smith*, 153 Pa. 639; *Black on Judgments*, § 976.

discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of *Webb v. Hewitt*, 3 K. & J. 438, which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the *ratio decidendi* of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it.

Upon the first point, therefore, we are against Mr. Wood, and have no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him and acceptance by him of goods in satisfaction of the debt would be equally an answer.

But Mr. Wood is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C., the obligor, to A., the latter being joint obligee with B., would in equity be an answer to the claim by A. and B. on the bond. We cannot follow Mr. Bullen's argument that as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity, and say that as at common law payment to or release by A. would prevent A. and B. from suing, he is now in a position to treat A. as having been paid, and say that as this is a common law action there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence, he must take the equitable principles applicable to the circumstances in their entirety; and we must therefore inquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value. *Wallace v. Kelsall*, 7 M. & W. 264.

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *primâ facie*

be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. *Petty v. Styward*, Eq. Ca. Abr. 290; *Rigden v. Vallier*, 2 Ves. Sen. 258, cited in the notes to *Lake v. Craddock*, 1 White & Tudor, 5th ed. 208. "Though they take a joint security," says Lord Alvanley, M. R., "each means to lend his own money and to take back his own." *Morley v. Bird*, 3 Ves. 631. Where a mortgage debt has been paid to one of the mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title. *Matson v. Dennis*, 10 Jur. (N. S.) 461, 12 W. R. 926. This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right.

It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purpose of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen ought to amend by a further statement of the material facts, and our order is that the statement of defence be amended accordingly, and if that be not done within ten days, the plaintiff be at liberty to sign judgment for half the amount claimed. We trust that upon the amended pleading being delivered the plaintiffs will, if possible, meet it by any necessary addition to or correction of the facts alleged, and not repeat a motion of this kind, which asks the court to do what is to the last degree unsatisfactory, give judgment for a defect of pleading and in ignorance of all the facts which ought to be known before the rights of the parties are definitely adjudicated upon. Both parties are partly responsible for the present motion, and the costs of this appeal will be costs in the cause.

*Order accordingly.*¹

¹ In *Savage v. Blanchard*, 148 Mass. 348, Holmes, J., in delivering the opinion of the court, said: "In former days, possibly a technical difficulty might have been found in the rule, that, although accord and satisfaction is a defence to a liability for damages,

DAY AND ANOTHER v. MCLEA AND ANOTHER.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, MARCH 18, 1889.

[Reported in 22 Queen's Bench Division, 610.]

APPEAL from the judgment of Charles, J., at the trial of the action without a jury.

The action was brought to recover damages for breach of contract. The defence was that the plaintiffs had agreed to accept and had accepted £102 18s. 6d., in full satisfaction of all demands in respect of the breach. It appeared that, after the breach, the plaintiffs made a claim on the defendants who thereupon sent them a check for £102 18s. 6d., being less than the amount claimed, stating that it was "in full of all demands," and inclosing a receipt in that form for signature by the plaintiffs. The plaintiffs wrote in reply that they took the check on account, and had placed it to the defendants' credit, at the same time inclosing a receipt on account, and asking for a check for the balance of the claim. In answer to this letter the defendants wrote stating that the payment was made in full of all demands, and asking for a receipt in full. It was contended on behalf of the defendants that the keeping of the check by the plaintiffs was in law an accord and satisfaction of the claim. Charles J., held that there was no accord and satisfaction, and gave judgment for the plaintiffs.

The defendants appealed.

Firminger, for the defendants.

Bosanquet, Q. C., and *Stubbins*, for the plaintiffs.

LORD ESHER, M.R. This was an action to recover damages for breach of contract. The plaintiffs were claiming a considerable sum as damages, and, before action brought, the defendants sent them a check for £102 18s. 6d., being less than the amount claimed, with a form of receipt, to be signed by the plaintiffs, that this sum was accepted in full satisfaction of the claim. The plaintiffs kept the check but refused to accept it in satisfaction, and sent a receipt on account. It was contended that the keeping of the check so sent was, as a matter of law, an accord and satisfaction of the claim, and that the plaintiffs were

even on a speciality, a discharge of an obligation under seal or of record to pay a definite sum of money must be of as high a nature as the obligation. *Blake's case*, 6 Rep. 43 b, 44 a; *Peploe v. Galliers*, 4 Moore, 163, 165; *Spence v. Healey*, 8 Exch. 663; *Riley v. Riley*, Spencer, 114; *Mitchell v. Hawley*, 4 Denio, 414. But this rule has been much broken in upon by statute, and by decisions upon equitable grounds, in modern times. *Bond v. Cutler*, 10 Mass. 419, 421; *Farley v. Thompson*, 15 Mass. 18, 25; *Sewall v. Sparrow*, 16 Mass. 24, 27, and cases cited in *Quincy v. Carpenter*, 135 Mass. 102, 104; *Ballou v. Billings*, 136 Mass. 307, 309; *Hastings v. Lovejoy*, 140 Mass. 261, 265; *Herzog v. Sawyer*, 61 Md. 344; *Weston v. Clark*, 37 Mo. 568, 572; *Hurlbut v. Phelps*, 30 Conn. 42. We have no doubt that an indorser of a writ may prove payment, or accord and satisfaction, by parol evidence, and that satisfaction before judgment in the original suit is as good a bar as satisfaction afterwards."

See further 9 Harv. L. Rev. 55.

bound either to take it in full satisfaction or to return it. The contention, therefore, was that the plaintiffs having kept the check must be taken in law to have accepted it in satisfaction. Upon the other side it was contended that the keeping of the check could only be evidence of accord and satisfaction, and that whether or not it was taken in satisfaction was a question of fact to be determined according to the circumstances of the case. That argument raises the question whether the fact of keeping a check sent in satisfaction of a claim for a larger amount is in law conclusive that there has been an accord and satisfaction. It is said that that inference of law must be drawn even though the person receiving the check never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law. This very question, however, came before this court in *Miller v. Davies*.¹ In that case the action was upon a solicitor's bill of costs for £50, and there was a plea of accord and satisfaction. Before action the defendant sent the plaintiff a check for £25, with a letter stating that, in order to put an end to the matter, he sent the check for £25, on the terms that the plaintiff would receive it in settlement. The plaintiff kept the check and cashed it, and wrote to the defendant that he declined to accept it in settlement and that he required a check for the balance. The defendant thereupon wrote in reply requesting the plaintiff to return the check if he would not accept it in satisfaction. The jury found that there was no accord and satisfaction. It was contended there as in the present case that the fact of the plaintiff keeping the check was conclusive in law that he had taken it in accord and satisfaction of the claim, inasmuch as it had been sent in satisfaction and the plaintiff was bound either to keep it upon the terms on which it had been sent or to return it. This court, however, held that the fact of keeping the check was not conclusive in law, that the question was one of fact, and that the jury having found that there was no accord and satisfaction the court would not interfere. That case is clearly in point. The question, therefore, whether there has been an accord and satisfaction is one of fact. It was for the judge to decide whether the plaintiffs agreed to take £102 18s. 6d. in satisfaction of their claim. The learned judge has found that fact in favor of the plaintiffs and consequently this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. It seems to me, as a matter of principle as well as authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two

¹ Not reported. Decided by the Court of Appeal, November 10, 1879.

persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact. Therefore, upon principle, as well as upon the authority of the case of *Miller v. Davies*, which has been brought to our notice, the judgment of Charles, J., must be affirmed.

Fry, L. J. I also agree that the case of *Miller v. Davies* is conclusive upon the point of law.

Appeal dismissed.

SAMUEL F. HULL v. H. A. JOHNSON & CO.

RHODE ISLAND SUPREME COURT, APRIL 25, 1900.

[*Reported in 22 Rhode Island, 66.*]

STINESS, J. The plaintiff did work for the defendants as a carrier, for which a balance of \$58.48 was due. In the course of his service, in 1895, the defendants sent him a lease of an oven, with instructions to take it from the lessee. By the agreed statement of facts it appears that he lost possession of the lease, and thereupon the defendants claimed that he was liable to them for its value, fifty dollars. The plaintiff denied his liability, and the matter rested until their settlement in August, 1898, when the above balance was due on the plaintiff's account. In settlement of this balance the defendants sent a check for \$8.48 to the plaintiff and a receipt for the \$50, both under cover of a letter in which the defendants said: "We hereby tender our check for the balance due on your account, which we trust will be satisfactory." On the back of the check these words were stamped: "Good only if when properly endorsed in full of all demands to date against H. A. Johnson & Co." The plaintiff took the check, struck out these words, deposited it on his account, and it was paid, through clearing, six days later, at the National Eagle Bank in Boston, on which it was drawn. On that sixth day the plaintiff returned the receipt for "loss of lease," and notified the defendants that he did not recognize his liability, and credited them with the \$8.48 on account. On these facts the defendants claim an accord and satisfaction.

A tender upon a condition is not good as a tender, and payment of a less sum than is due on an undisputed claim, even though it be offered in full settlement, does not bar a recovery for the balance. So far the parties to this suit agree; but the sum tendered having been accepted, and the amount due being in dispute, the question arises whether, under these facts, the parties made a settlement.

Upon this question the great weight of authority is in the affirmative. The law favors the settlement of controversies, and so holds that an offer of money made and accepted on that condition binds both parties. The rule had its origin in cases of unliquidated claims where the settle-

ment was in the nature of a compromise; but it has been extended to all cases of dispute where an offer of settlement has been made and an acceptance signified by taking the money so offered. The law leaves the parties where their acts have put them. The principle on which the rule is founded is that one who takes money offered on condition thereby accepts the condition, and in the absence of fraud or other excuse he is bound by his act. In this case, although the notice stamped on the back of the check is somewhat vague, we think it clearly means, and must have been understood to mean, that the check was good only if it was accepted in full of all demands against the defendants. The plaintiff, therefore, received it coupled with the condition. Cases upon this subject are fully stated in an exhaustive note to *Fuller v. Kemp*, in 20 L. R. A. 785, and need not be repeated. We will refer only to a few recent cases which bear upon the questions arising under the peculiar facts of this case.

The first is whether the plaintiff's erasure of the condition on the check was enough to show that he did not agree to it, and hence that he has not assented to an accord and satisfaction. Numerous cases hold that it is the acceptance of the money, and not one's statement at the time, which binds him. But, however this may be, the erasure on the check was not made in the presence of the defendants, and could not have been known to them until the check had reached their bank and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money. He cannot by his own act, unknown to them, change his relation to the transaction. If he had taken the money in their presence upon the same condition, but had said to a third party, without their knowledge, that he would not accept it in full payment, the case would not have been essentially different. And yet in such a case it is evident that he would be held to have accepted the condition.

In *Logan v. Davidson*, 45 N. Y. Supp. 961,¹ a defendant sent a check in full settlement, and the next day, probably the day of its receipt, the plaintiff wrote that he credited it on account and declined to accept it as a final payment. But the court held that the acceptance of the money operated as a satisfaction of the claim, and thus constituted a complete accord and satisfaction; that the plaintiff could not accept the money, disregarding the condition, and impose a new condition upon the defendant which destroyed the one on which the payment was tendered.

The same decision was made, upon similar facts, in *Ostrander v. Scott*, 161 Ill. 339; *McDaniels v. Rutland*, 29 Vt. 230; *Looby v. West Troy*, 31 N. Y. Sup. Ct. (24 Hun) 78; *Reynolds v. Empire Co.*, 92 N. Y. Sup. Ct. (85 Hun) 470; and *Potter v. Douglass*, 44 Conn. 541. See also *Bull v. Bull*, 43 Conn. 455, and *Perkins v. Hadley*, 49 Mo. App. 556.²

¹ Affirmed on appeal, 162 N. Y. 624.

² Besides the decisions cited by the court, and cases collected in the note referred to above, see, in accord with the principal case, *Hamilton v. Stewart*, 108 Ga. 472,

The second question is whether in this case the plaintiff's claim can properly be regarded as disputed, since his bill is admitted and the defendants' claim is distinct from it, by way of recoupment for injury arising from the plaintiff's service. It is true that there is a technical difference between such a case and one of a controversy as to the amount due, but the principle which governs them is the same. Whatever may be the ground of the dispute, the fact remains that there is one. In order to settle the controversy the defendant offers to pay a certain sum on that condition, and the acceptance of the money so offered is as much an acceptance of the condition in one case as in the other. Such was the decision in *Conn. River Co. v. Brown*, 68 Vt. 239, where the defendant's claim was based upon a poor quality of lumber delivered and damage arising from failure to deliver it within the time agreed; also in *Tanner v. Merrill*, 108 Mich. 58, where the question in dispute was the right of the defendant to deduct the transportation of the plaintiff to and from his place of business. We are of opinion that the plaintiff's acceptance of the money offered in settlement amounted to an accord and satisfaction and precludes him from maintaining an action for the balance which he claims to be due.

Case remitted to District Court with direction to enter judgment for the defendant for costs.

FRANK L. JACKSON, PLAINTIFF IN ERROR, v. THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT IN ERROR.

NEW JERSEY COURT OF ERRORS AND APPEALS, NOVEMBER 23, 1900—
APRIL 29, 1901.

[Reported in 66 *New Jersey Law*, 319.]

ADAMS, J. The plaintiff, a driver employed by the Adams Express Company, was injured on October 18, 1899, at the Pennsylvania

476; *Lapp v. Smith*, 183 Ill. 179; *Bingham v. Browning*, 197 Ill. 122; *Michigan Leather Co. v. Foyer*, 104 Ill. App. 268; *Talbott v. English*, 156 Ind. 299, 313; *Anderson v. Standard Granite Co.*, 92 Me. 429, 432; *Fremont Foundry Co. v. Norton*, 92 N. W. Rep. (Neb.) 1058, 1060; *Naasoy v. Tomlinson*, 148 N. Y. 326; *Lewinson v. Montank Theatre Co.*, 60 N. Y. App. Div. 572; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Petit v. Woodlief*, 115 N. C. 120; *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239. See also *Hutton v. Stoddart*, 83 Ind. 539; *Pollman Coal Co. v. St. Louis*, 145 Mo. 651; *McCormick v. St. Louis*, 166 Mo. 315, 335. Contrary decisions are *Louisville, &c. Ry. Co. v. Helms*, 22 Ky. L. Rep. 964; *Rosenfield v. Fortier*, 94 Mich. 29. See also *Mortlock v. Williams*, 76 Mich. 568; *Krauser v. McCurdy*, 174 Pa. 174; *Rapp v. Giddings*, 4 S. Dak. 492. As to the necessity of an explicit statement that the check sent is intended as full payment, compare *Fremont Foundry Co. v. Norton*, 92 N. W. Rep. (Neb.) 1058; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Amer v. Folk*, 28 N. Y. Misc. 508; *Van Dyke v. Wilder*, 66 Vt. 583.

If the debt is liquidated the acceptance of a check, though stated to be given as full payment, will not operate as a complete discharge. *Talbott v. English*, 156 Ind. 299, 313; *Specialty Glass Co. v. Daley*, 172 Mass. 460; *Fremont Foundry Co. v. Norton*, 92 N. W. Rep. (Neb.) 1058, 1060; *Kelley v. Lawrence*, 78 N. Y. App. Div. 484. See further, *ante*, Vol. I. 201-215.

railroad depot, in Jersey City, while transferring goods from his wagon to a freight car. He brought suit against the railroad company, and recovered a verdict. Exceptions were taken to the refusal of the trial judge to nonsuit the plaintiff, and to direct a verdict for the defendant, and on these exceptions error has been assigned. The question of negligence is in the case, but need not be considered, as the defence of accord and satisfaction is decisive.

[The defendant proved in support of its defence of accord and satisfaction that the Adams Express Company was bound by a contract with the defendant to save it harmless from certain liabilities, including such actions as that of the plaintiff, and that in consideration of the payment to him by the Express Company of wages during a period of incapacity, the defendant had agreed to accept such payment in full satisfaction of all claim for his injuries. The case is free from any charge of fraud and from any suggestion that the plaintiff did not comprehend the document that he signed.¹]

It remains to consider the real question in controversy, which is as to the effect of an accord and satisfaction entered into, not with the person against whom a claim is asserted, but with a third person. In this case the third person is a corporation, which, between itself and the person against whom the claim is asserted, has made itself primarily liable by an agreement undisclosed to the claimant.

An early authority as to accord and satisfaction with a third person is *Grymes v. Blofield*, Cro. Eliz. 541, which reads as follows:

"Debt Upon an Obligation of 20 pounds. The Defendant pleads, That J. S. Surrendered a Copy-hold Tenement to the use of the Plaintiff in satisfaction of that 20 pounds, which the Plaintiff accepted, &c. And it was thereupon demurred. Popham, and Gawdy held it to be no plea: for J. S. is a meer stranger, and in sort privy to the Condition of the Obligation: and therefore satisfaction given by him is not good. *Vide* 36 H. 6; Barr, 166; 7 H. 4, pl. 31. Afterwards, Pasch. 31, Eliz. by Popham; and Clench, *casteris justiciariis absentibus*, it was adjudged for the Plaintiff."

In *Edgcombe v. Rodd*, 1 Smith, 515, reported also in 5 East, 294, the case of *Grymes v. Blofield* was discussed, Mr. Justice Lawrence remarking that it was quite unreasonable to doubt the authority of that case. In *Jones v. Broadhurst*, 9 C. B. 193, Mr. Justice Cresswell commented upon *Grymes v. Blofield*, and pointed out its inconsistency with an earlier case, which is thus stated in Fitz. Abr. tit. "Barre," pl. 166 (Hilary, 36 H. of L. 6): "If a stranger doth trespass to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" A course of decision ensued, which Baron Parke summed up in *Simpson v. Eggington*, 10 Exch. 844, in the following words:

¹ This statement has been substituted for the fuller statement in the opinion.

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones v. Broadhurst*, 9 C. B. 193; *Belshaw v. Bush*, 11 C. B. 191, and *James v. Isaacs*, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw v. Bush*, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case of *James v. Isaacs*, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad. We consider therefore the law as fully settled by these cases."

The English cases justify the observation of Mr. Justice Wales, in *Snyder v. Pharo*, 25 Fed. Rep. 398 (at p. 401), that none of the later decisions adhere with any strictness to the rule laid down in *Grymes v. Blofield*, and that it is evident, from an examination of them, that a plea of satisfaction by a stranger, when properly averred, would be held good.

In the United States the case of *Grymes v. Blofield* has been, to some extent, followed, notably in the State of New York. The earliest case is *Clow v. Borst*, 6 Johns. 37, which, like *Grymes v. Blofield*, arose upon a point of pleading. It was there held, on demurrer, in an action of covenant, that a plea of the acceptance of a satisfaction by the plaintiff from a third person or stranger is not good. This case was followed in *Daniels v. Hallenbeck*, 19 Wend. 408; *Bleakley v. White*, 4 Paige, 654; *Atlantic Dock Co., &c. v. New York*, 53 N. Y. 64, and *Muller v. Eno*, 14 id. 597, 605. To the same effect is *Armstrong v. School District No. 3*, 28 Mo. App. 169. These cases are not, on the whole, inconsistent with the idea that this defence may be made if it be properly pleaded.

The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person, when such person either had authority to make it or the act was followed by ratification and the article received in satisfaction was retained. In *Leavitt v. Morrow*, 6 Ohio 71; s. c. 67 Am. Dec. 334, the Supreme Court of Ohio (Chief Justice Bartley reading the opinion) held, after a vigorous discussion of the doctrine, that an accord with and satisfaction coming from a stranger having no pecuniary interest in the subject-matter are, if accepted in discharge of the debt, a perfect defence to a subsequent action against the debtor. Another valuable case is *Snyder v. Pharo*, 25 Fed. Rep. 398, 401, where, in an opinion written by Mr. Justice Wales, all the leading cases are cited. The head-note reads as follows:

“Satisfaction of a debt by the hands of a stranger is good when made by the authority of or subsequently ratified by the defendant. The fact of pleading it will be sufficient evidence of ratification.” In *Beach Mod. L. Cont.* 542, it is said that an accord with and satisfaction moving from a stranger or person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitute a good defence to an action to enforce the liability against the debtor. In the note to *Cumber v. Wane*, 1 Sm. Lead. Cas. (9th ed.) 624, the same conclusion is reached. The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it, and his retention of it, operate to extinguish his right. As was said in *Hawshaw v. Rawlings*, 1 Str. 23: “Although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is.” In 2 Pars. Cont. (8th ed.) 688, the same rule is stated, with the remark that the defence is clearly available when the debtor and the stranger are principal and agent. In 2 Chit. Cont. (11th ed.) 1133, this is said to be the correct doctrine. This is true, because the nature of the relation of principal and agent is such that proof of its existence necessarily shows that the person against whom the claim is asserted has made the accord and satisfaction his own.

In the case in hand the express company was not an agent of the railroad company. It was its indemnitor. This does not weaken the defence. The express company is bound by contract to answer for just such damages as these. As the plaintiff is no party to this contract, and so is not bound by it, the performance by the express company of its obligation goes in exoneration of the railroad company. To use the language of Baron Parke, its payment is “for the defendant and on its account,” since the plaintiff’s right of action against the railroad company is one of which nothing but his own consent can deprive him. Moreover, the plea recognizes and adopts the settlement. There are present here original authority; action beneficial to the defendant, founded on a new consideration; ratification and retention by the plaintiff of the payment received in satisfaction. These are the elements that bring a case within the rule. It follows that the defence of accord and satisfaction was sustained by the proof, and that it was error to refuse to direct a verdict for the defendant.

*The judgment is reversed.*¹

¹ See 23 L. R. A. 120 n.

SECTION V.

ARBITRATION AND AWARD.

FREEMAN v. BERNARD.

IN THE KING'S BENCH, TRINITY TERM, 1702.

[Reported in 1 Lord Raymond, 247.]

ASSUMPSIT upon an agreement for the delivery of a certain quantity of hops, etc. The defendant pleads that the plaintiff and he had submitted this matter to the arbitration of J. S., *ita quod* the award should be made, and ready to be delivered, by such a day, &c., and the defendant shows that J. S. made an award before the day that the defendant or his executors or administrators should give a general release to the plaintiff, and that the plaintiff should give a general release to the defendant; and the defendant pleads that he was always ready, and yet is, to sign and seal a release. The plaintiff demurs. And divers exceptions were taken to this award: 1. That the submission is *ita quod* the award be ready to be delivered by such a day, and the defendant has not averred that it was ready to be delivered by the day. *Sed non allocatur*. For per HOLT, C. J., it has been often held in this court that if the award be made by the day, it is ready to be delivered, and so it appears, and therefore there is no need to aver that it was ready. 2. Exc.: That the award is void for the uncertainty, viz., that he or his executors or administrators, &c., so that time is left to him to perform it during his life, or he may leave it to his executors. And election given in an award is ill. 1 Roll. Rep. 271. But to this exception Mr. How, for the defendant, argued that the court will reject the words "or his executors or administrators," because as to them (he said) the award was void; for the executor or administrator is out of the submission, and the power of the arbitrator determines with the life of the person submitting, and so cannot extend to the executor or administrator. Debt upon award does not lie against an executor or administrator. But HOLT, C. J., said that the executors are bound by the submission of their testator; but the addition of them in this award is but cautionary, and therefore will not vitiate. 3. The third exception was that the plea is ill because the defendant has not averred performance of this award, and the plaintiff has no remedy to compel him to perform it. *Sed non allocatur*. For per HOLT, C. J., heretofore if the award was that the party should do any collateral act, it was held that the party could not plead this before performance; *contra* if the award appointed the payment of money. And the reason was because the party had no remedy in the former case to compel performance; but other-

wise in the latter case. But that reason fails now ; for now assumpsit lies upon the mutual promises, and no assumpsit was allowed formerly upon mutual promises ; but heretofore, if the submission was by bond, the award might have been pleaded before performance, because the party might have had remedy to compel performance. And HOLT, C. J., said that he had known a rule of court to submit to an award to be given in evidence upon assumpsit. But judgment was given by the whole court for the plaintiff ; for the arbitrator has awarded nothing in satisfaction, but only has ordered means to discharge the action. He has not awarded a horse or money in satisfaction, but only mutual releases. Where an award creates a new duty instead of that which was in controversy, the party has remedy for it upon the award ; and therefore if the party resorts to demand that which was referred and submitted, the arbitrament is a good bar against such action. *Contra* where the award does not create a new duty, but only extinguishes the old duty by a release of the action.

ALLEN v. MILNER.

IN THE EXCHEQUER, MICHAELMAS TERM, 1831.

[Reported in 2 Crompton & Jervis, 47.]

LORD LYNTHURST. This was an action of *indebitatus assumpsit*, for tolls, &c. The defendant pleaded, as to the count for tolls, that differences had arisen between him and the plaintiff, touching the said claim, and that they mutually submitted themselves to refer, and did refer, the said matter in difference to arbitration ; that they mutually promised to abide by the award ; and that the umpire made his award of and concerning the said premises, and did thereby award, that the defendant should pay to the plaintiff the sum of £13. To this plea, the plaintiff demurred specially, because the plaintiff did not aver payment of the £13, or any other satisfaction of the plaintiff's demand. The question, therefore, is, whether this award is, of itself, without payment or satisfaction, any bar ; and considering the nature of the plaintiff's demand, and the nature of the award, we are of opinion that it is not. The plaintiff's demand is for a debt, and the award is not for the performance of any collateral act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, whether there were any, and what debt ; the award only ascertains that there is a debt, specifies the amount, and directs the payment ; but the money, till paid, is due in respect of the original debt, *i. e.* for tolls ; its character remains the same, nothing is done to vary its nature or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and the award had directed a payment of money in satisfaction of the demand, it might

then have been said that the award had changed the nature of the original demand, that the right to have the goods was gone, and the only right remaining was the substituted right, *i. e.* the right to have the money; or, had the demand been for a debt, and the award had directed not payment in money, but payment in a collateral way, as by delivery of goods, performance of work, &c., it might, perhaps, have been said, that the right to have payment in money was gone; but here the £13 is to be paid for the original demand, *i. e.* for the tolls, and it is to be paid as that demand was to have been paid, *i. e.* in money. In the case of *Crofts v. Harris*, Carth. 187, the declaration contained three counts: one, for not shipping and consigning cotton wool; one, upon an *indebitatus* for goods sold, with a conditional promise to pay in money, if the defendant did not ship and consign cotton wool to the plaintiff; and the third, upon a general *indebitatus assumpsit*, for goods sold; the defendant pleaded a submission of all matters, and an award thereon, which he set out, but he did not allege performance on his part; what the matter awarded was, whether the payment of money, or the performance of any other matter, does not appear. It turned out on demurrer, that the award related only to the cotton wool, not to the other matters; so that it was pleaded to what it could not bar, and, as to the cotton wool, it was conditional only, and therefore void. The plaintiff, therefore, had judgment. But Carthew says, the following diversities were taken by the Court to be law: First, That an award without performance is a good bar to an action on the case, if the parties have mutual remedies against each other, to compel the execution of the matters awarded; and (after other two positions, not bearing upon this case), that if the award in that case had been general, the defendant might have pleaded it in bar of all the promises in the declaration, and it would not have amounted to the general issue. In this case, therefore, there was no decision upon the point. The position, that an award without performance would be a good bar to an action upon the case, would be within the distinction we have taken, if by an action on the case were meant, as it probably was, not an action for a debt, but a special action on the case for damages; and, as we are not apprized what the award there was, it does not follow, that, because the award in that case would have been a good bar, the award here, which is only an award of payment, is. In *Allen v. Harris*, Ld. Raym. 122, relied upon in *Gascoyne v. Edwards*, it is certainly said by counsel, *arguendo*, that arbitrament may be pleaded without performance, because the parties may have reciprocal remedies, and the Court is represented to have said, that "if arbitrament be with mutual promises to perform it, though the party has not performed his part, who brings the action, yet shall he maintain his action, because an arbitrament is like a judgment, and the party may have his remedy upon it." But this was not the point in judgment before the Court, the defendant had pleaded not an arbitrament, but an accord, which was held bad;

and the action was not an action for a debt, but an action of trover. The case of *Gascoyne v. Edwards*, 1 Younge & Jervis, 19, admits (if not of both the answers we have mentioned) clearly of the first, viz. that the demand was for general damages, and not for a debt. The first count of the declaration, we have ascertained from the pleadings, was covenant for not repairing; the award was pleaded to that count only, and it directed the payment of £5 for damages, the repair of the premises, and the quitting them at a given period. That case, therefore, according to the distinction we have taken, does not govern the present, because the action there was not for a debt, but for general damages for not repairing. Upon the ground, therefore, that the present action is for a debt, that the award only ascertains the amount of that debt, and that the money payable under the award is nothing but the original debt so ascertained in amount, we are of opinion that this plea is bad, and that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

COMMINGS v. HEARD.

IN THE QUEEN'S BENCH, JULY 25, 1869.

[*Reported in Law Reports, 4 Queen's Bench, 669.*]

DECLARATION containing indebitatus counts for work done and materials provided, for money paid, for the conveyance of goods, for interest and money due on accounts stated, and claiming 400*l*.

Fourth plea: Except as to the sum of 145*l*. 3*s*. 1*d*., parcel of the money claimed, the defendant says that the plaintiff ought not to be admitted or received to claim or allege that at the commencement of this suit any more than the sum of 145*l*. 3*s*. 1*d*. was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because the defendant says that after the accruing of the causes of action in the declaration mentioned, and before this suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them before this suit they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of William Wills, and agreed to be bound by his award as to such amount; and that afterwards, and before this suit, the said William Wills, having taken upon himself the burden of the arbitration, and having heard and considered all that the plaintiff and defendant respectively had to allege, and all the evidence which they had to produce relating to the premises so referred, made his award in writing of and concerning the premises so referred to him as aforesaid, and thereby awarded that the amount due from the defendant to the plaintiff in respect of the causes of action was 145*l*. 3*s*. 1*d*.

Demurrer and joinder.

Anstie, in support of the demurrer.

Jelf, contra.

LUSH, J. This was a demurrer to a plea. [The learned judge read the plea]. It is to be observed that the plea does not profess to be an answer to the entire claim, but to the excess over and above the amount of 145*l*. The question is, whether the plaintiff is concluded by the award from alleging that the entire amount was due to him. I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, that the parties are not concluded by an award, and that it is distinguishable from a judgment, which, it is admitted, would have bound the parties. The contention was that it was so distinguishable because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be. I am at a loss to suggest any reason that would be applicable to the one, that would not be applicable to the other tribunal.

Several cases were cited which it was supposed were authorities in favor of the plaintiff, but which, I think, may be contended to be clearly authorities in favor of the defendant. It is not a new doctrine that an award is a bar. That is found in Comyn's Digest, Tit. Accord, D. 1; and there are several instances of it to be found in the books. The case of *Allen v. Milner*, 2 C. & J. 47, was relied on, on the part of the plaintiff. When that case is examined it will be found to differ from the present in a most essential particular. There the money demand had been referred to arbitration. The arbitrator has found a given sum to be due from one to the other. That case was a money demand, as this is; the action was brought on the original consideration, but the plea, unlike the plea in this case, set up the award as a bar to the entire action. The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently a plea which professed to answer the whole of the debt, and admitted a part of it was due, was a bad plea. That is the ground of that decision.

On the other hand, it is settled, where the claim is one for unliquidated damages, an award which settles the amount may be pleaded in bar to the entire action, although the plea, on the face of it, shows that the money is not paid. In the case of *Gascoyne v. Edwards*, 1 Y. & J. 19, there was a general plea pleaded to the whole declaration, by which it was

alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay the plaintiff 5*l.* to put the premises in repair. The plea, although it did not aver that the 5*l.* was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages. The principle upon which this was held a good plea is, that an award, professing to determine the matter, is binding upon both parties, and it as much precludes the parties from alleging anything contrary to the award as a judgment would, on the ground that it is *res judicata*. If this action had been brought upon the award, it is clear the defendant would be precluded from saying the 145*l.* was not due, because the arbitrator found it was. Why is not a plaintiff equally prohibited from alleging that more is due when the amount has been found by the arbitrator? Each must be concluded by the finding. It is elementary knowledge that an award, good on the face of it, is binding and conclusive upon both parties to it until it is set aside. Nothing appears on the face of this plea to show that the award is not perfectly good. It professes to adjudicate upon all matters referred, and it has decided finally the whole matter. In answer to the argument that the award may be bad, it is enough to say that if the award is bad it might be shown by a replication setting it out. If it is not bad on the face of it, then the parties not having moved to set it aside, it stands, and each party is prohibited from objecting to it. The plea is a perfectly good plea, and our judgment must be for the defendant.

The plea, no doubt, is in an unusual form, because it is pleaded by way of estoppel. It begins in the ordinary way of a plea of estoppel, that the plaintiff ought not to be admitted or received to say so and so. That I consider immaterial. The award is a bar, and it concludes the parties.

HAYES, J. I quite agree that this plea is good, although pleaded in form of an estoppel, but upon consideration I think it is a plea in bar, and in truth, a plea to the merits. It is pleaded, not to the whole of the demand, but only to the excess beyond the amount found by the arbitrator. It is objected that the plea is bad because it does not show that the sum awarded has been paid. We have not the whole record before us, and for anything we know, the money may have been paid into court.

The cases that were cited on both sides clearly show the plea to be good. In *Whitehead v. Tattersall*, 1 A. & E. 491, an action was brought on a covenant. It appeared that before action the plaintiff and defendant had agreed to refer to arbitration a dispute relating to the repairs of certain premises, and the referee had ascertained the amount of the dilapidations. That case was before the new rules of pleading. The defendant pleaded *non est factum*, and the award was held to be conclusive as to the amount of damages to which the plaintiff was entitled for the breach of covenant. The court said the award

was binding on the plaintiff, and therefore, on the defendant. Taunton, J., says: "The award of an arbitrator concludes the right, unless you can impeach the award." Therefore the award there was held conclusive with respect to the amount of damages. *Parkes v. Smith*, 15 Q. B. 297, 19 L. J. (Q. B.) 405, seems to me to be quite undistinguishable from the present. It was pleaded that the award of the arbitrator was conclusive on both parties, and it was contended that it was a matter of estoppel, and ought to be pleaded as estoppel; but the court thought it was a matter in bar, and not a matter of estoppel. Coleridge, J., pointed out the distinction, and said the defence was that there was no cause of action, and not that, admitting a cause of action to exist, the plaintiff was estopped from setting it up. The plea in that case did not allege a payment of the sum found to be due by the arbitrator. Therefore it seems to me this case is not distinguishable from *Parkes v. Smith*, 15 Q. B. 297; 19 L. J. (Q. B.) 405. In the case of *Allen v. Milner*, 2 C. & J. 47, the plea was held bad because it was pleaded to the whole cause of action. It admitted that the amount found by the arbitrator was due, but did not show that the plaintiff's claim in respect of it was answered. There is this difference between the cases: In the present case the plea is pleaded to the excess of what the arbitrator found to be due. We do not know what has taken place as to the 145*l.* 3*s.* 1*d.*; all we know is, that the excess to which the plea is directed has been found by the arbitrator not to be due, and both parties are bound by the finding. Therefore, whatever the form of the plea, it would not be bad, because pleas are not governed by their beginning and by their ending, but by the substance of them. Therefore this is substantially a good defence to the action.

Judgment for the defendant.

BOSTON AND LOWELL RAILROAD CORPORATION v.
NASHUA AND LOWELL RAILROAD CORPORATION.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 5 —
JUNE 22, 1885.

[Reported in 139 *Massachusetts*, 463.]

CONTRACT upon an award of arbitrators. The agreement of submission, dated September 30, 1882, and signed by the parties, recited that certain disputes and differences had arisen between them concerning their rights under or growing out of a certain joint traffic contract entered into in 1857, and which continued for twenty years from October, 1, 1858; and that the Nashua and Lowell Railroad Corporation, on April 17, 1880, brought a bill in equity in the Circuit Court of the United States for the District of Massachusetts for the recovery of the sums claimed to be due to it. Then followed this recital: "And

whereas, it has been agreed by and between the said parties to said suit to refer the said claims and all other claims now existing in favor of either party against the other to arbitration, upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, but without prejudice from any defence based on the statute of limitations, unless such defence would be good and valid in law if pleaded to the bill in equity aforesaid, commenced April 17th, 1880." The agreement then stated that the parties submitted all demands of either against the other which originated before October 1, 1880, to the determination of Elias Merwin, William S. Gardner, and Waldo Colburn, "the award of whom, or of the greater part of whom, shall be final; and if either of the parties neglects to appear before the arbitrators, after due notice of the time and place appointed for hearing the parties, the arbitrators may proceed in its absence, and the arbitrators may make such award respecting costs and expenses as they shall judge reasonable, including a compensation for their own services; and the parties further agree that they will respectively obey, observe, perform, fulfil, and keep the award of the said arbitrators of and concerning the premises. It is understood and agreed that the same rule and limitation of time as to the statute of limitations shall govern the arbitrators aforesaid, if said statute is pleaded by either party."

Annexed to the agreement were certain exhibits, containing a statement of the claims of the respective parties. On August 7, 1883, the arbitrators signed their award. The instrument began by stating that the arbitrators met the parties on February 23, 1883, and proceeded as follows: "It was then agreed by the said parties that it was desirable that the arbitrators should first hear, consider, and determine the claims of the Nashua and Lowell Railroad Corporation marked 'Numbers 3, 4, 5, and 6,' in their statement of claims annexed to said agreement, entitled Exhibit 1, before entering upon a hearing of any other claims of either party under said submission, and, with the consent, and at the request of both parties, the arbitrators thereupon, and upon subsequent days, namely, on the twenty-fourth and twenty-sixth days of February, 1883, proceeded to hear the respective parties in reference to said third, fourth, fifth, and sixth claims of the Nashua and Lowell Railroad Corporation, at each of which hearings the respective counsel aforesaid were present, and having fully heard and considered the respective proofs and arguments of the said parties in reference thereto, the subscribers, on the twenty-third day of May, 1883, at Boston, made their final award and determination in respect to said claims, and announced the same to the said parties, who were present by their said counsel, in the words following, namely:—

" 'Several of the claims made by the Nashua and Lowell Railroad Corporation against the Boston and Lowell Railroad Corporation were by consent of both parties submitted to the referees for their award and determination, with the understanding and reservation that the remain-

ing claims made by the respective parties were to remain open, either for adjustment by the parties themselves, or for future hearing and determination by the referees. The items submitted to the referees, and upon which they have been requested to pass, are those numbered 3, 4, 5, and 6 in Exhibit 1, annexed to the agreement of reference. The referees have considered these items, and are of the opinion, and so award and determine, that the Nashua and Lowell Railroad Corporation is not entitled to recover anything from the Boston and Lowell Railroad Corporation in respect to either of said items.'"

The award then stated that the hearing of any other claims under the submission "was then by agreement of all parties" adjourned to June 29, 1883; that, at a hearing on the day to which the matter had been adjourned, the counsel for the Nashua and Lowell Railroad Corporation presented a motion for a rehearing as to the law involved in the fifth claim, and in so much of the sixth claim as accrued after June 25, 1877; that this motion was overruled; that the further hearing was adjourned until August 1, 1883; and that on July 30, 31, each of the arbitrators received from the Nashua and Lowell Railroad Corporation certain papers, copies of which were annexed to the award.

The first paper purported to contain a vote of the directors of the defendant corporation, passed July 5, 1883, which, after reciting the proceedings before the arbitrators, proceeded as follows: "Now, therefore, resolved, under the circumstances above set forth, that this corporation will revoke said submission, and refuse to proceed further under the same, unless the referees will either make a special report of their findings of fact and rulings of law in relation to the fifth claim, and that portion of the sixth arising after May, 1877, or else unless this corporation shall be permitted to amend the said submission by striking out or withdrawing therefrom the said fifth claim, and that portion of the sixth claim which has accrued or arisen since the vote of June 25th, 1877."

The second paper, dated July 30, 1883, was signed by the corporate name of the defendant, by its president. It contained, after numerous recitals, the following: "Now, therefore, the Nashua and Lowell Railroad Corporation, in pursuance of said vote, does hereby revoke the said submission and all the authority therein and thereby conferred upon Elias Merwin, William S. Gardner, and Waldo Colburn, as arbitrators named therein, and does hereby terminate, so far as it lawfully may, any and all power heretofore given them to act under the said submission."

The award then stated, that on August 1, 1883, the arbitrators met the parties, according to adjournment; and that the counsel for the Nashua and Lowell Railroad Corporation handed to the arbitrators a paper of which the following is a copy:—

"At a meeting of the directors of the Nashua and Lowell Railroad held at Boston, August 1, 1883, at nine o'clock in the forenoon, the president having laid before the board a copy of an instrument of revo-

cation of the submission entered into on the 30th day of September last, between this company and the Boston and Lowell Railroad Corporation, said submission being executed by him in behalf of this company, in pursuance of the directors' vote of July 5th last, it was voted that the course so taken by him be ratified and approved, and that the directors will treat the said submission as no longer in force.

"A true extract from the record. Attest: W. W. Bailey, Clerk."

The award then stated that the arbitrators were of the opinion that they were bound to proceed with the hearing if either party so desired, and so informed the parties, and that they were ready to hear them; that the counsel for the Nashua and Lowell Railroad Corporation stated that that corporation did not intend to proceed further, and that he then withdrew.

The award then stated the further proceedings before the arbitrators, and concluded with a "summary," which began as follows:—

"The subscribers, having fully heard the respective parties under said submission, so far as they desired to be heard, and having fully considered their respective proofs and arguments, do now, in addition to their final award and determination of May 23, 1883, as hereinbefore set forth, award and determine, and this is our final award and determination in the premises, namely:—

"1. That the Nashua and Lowell Railroad Corporation is not entitled to recover any sum of the Boston and Lowell Railroad Corporation by reason of any of the claims specifically made by it or embraced by said agreement of reference against said Boston and Lowell Railroad Corporation."

Then followed an award in favor of the Boston and Lowell Railroad Corporation, on their claims, to the amount of \$12,148.88.

Trial in the Superior Court, before Mason, J., who allowed a bill of exceptions in substance as follows:—

There was contradictory evidence whether the statement of the arbitrators contained in the clause beginning "Several of the claims," and ending with the words, "by the referees," was correct, the defendant insisting that such statement was not correct, and the plaintiff insisting that it was correct. The other facts stated in the award were not in dispute.

The defendant took the ground that the only assent given by it was to the determination by the arbitrators in the first instance of certain questions of law as preliminary, and that they might pass upon such legal questions, and announce the result, before proceeding to consider other claims embraced in the submission, and before passing upon such other claims, and that the defendant never assented to any partial and final award being made, so as to be binding on the defendant before the revocation was notified to the arbitrators. The plaintiff contended that the statement in the award was true.

Thereupon the defendant contended, and requested the judge to rule as follows: "1. The clause in the submission stating that it was en-

tered into 'upon the understanding that said arbitrators shall be governed in their determination and award by the rules of law applicable to the case, operated as a limitation or restriction of the power of the arbitrators, so that their determination of matters of law was not final. 2. If the arbitrators treated the submission as making them final judges of all questions of law raised before them, and undertook to pass finally upon all matters of law laid before them, and did so in such a way that the defendant was deprived of all means of revising their legal rulings except by revoking the said submission, and the defendant did revoke the submission for that reason, then such revocation was legally justifiable. 3. Whether the defendant's revocation of the submission in this case was legally justifiable or not, it operated to deprive the arbitrators of all further power of action under the same."

The plaintiff asked the judge to rule, whatever he might find upon the question of fact in dispute, that the plaintiff was entitled to a finding in its favor for the amount of the award, and interest on the same; but the judge declined so to rule.

The judge refused to give the first two rulings requested by the defendant, but did give the third ruling requested, and thereupon found for the defendant. The plaintiff alleged exceptions.

A. A. Strout, for the plaintiff.

F. A. Brooks, for the defendant.

FIELD, J. The award on which this action was brought was in writing, and was signed and published by the arbitrators on August 7, 1883. Before the award was signed, the defendant delivered to the arbitrators a paper signed by the president of the defendant corporation in its name, dated July 30, 1883, and a copy of the vote of the directors of the corporation passed on August 1, 1883. These papers we construe to be an unconditional revocation by the defendant of the authority of the arbitrators to proceed under the submission. It is not contended that this revocation was waived or withdrawn by the defendant.

A submission to arbitration is a power which may be revoked at any time before it is executed by the publication of the award, and an agreement that the arbitrators may proceed *ex parte*, if either party neglects to appear, does not make the submission irrevocable. *Wallis v. Carpenter*, 13 Allen, 19, 24; *Marsh v. Bulteel*, 5 B. & Ald. 507; *Mills v. Bayley*, 2 H. & C. 36.

The contention is, that the submission was partially executed by the award that the defendant was not entitled to recover anything from the plaintiff in respect to the items numbered 3, 4, 5, and 6 in the statement of claims made by the defendant. It does not appear that this was a separate award, actually reduced to writing and signed by the arbitrators. The unavoidable inference is, that this conclusion was announced to the parties as the determination of the arbitrators upon these items; and that the meeting of the arbitrators was adjourned for the purpose of subsequently hearing and determining the other claims of the parties, unless meanwhile the parties settled them.

An award must cover all the claims submitted and presented to the arbitrators, and must be mutual, certain, and final. If we assume that the oral announcement of the arbitrators of their determination upon these items was intended to be their final award on these items, the award would be bad, unless the parties had agreed that these items should be the subject of a separate award, because this award did not decide all the substantial matters submitted and presented. *Randall v. Randall*, 7 East, 81; *Robson v. Railston*, 1 B. & Ad. 723; *Stone v. Phillips*, 4 Bing. N. C. 37; *Bhear v. Harradine*, 7 Exch. 269.

It has not been found as a fact, that the parties agreed that these items should be the subject of a separate award. If this fact were found, it would perhaps show that the parties, by their subsequent agreement, entered into two separate submissions instead of one; but then the making and publishing of an award under one submission would not be a part execution of the power conferred by the other. But if it be assumed that the statement in the award is true, we are of opinion that the award itself does not show that the announcement of the determination of the arbitrators upon the items mentioned was intended by them as the making and publication of an award. The award, as it was finally made and published, is one and entire. The power of the arbitrators over all the matters submitted, if there had been no revocation, would have continued until the award was finally made and published. Before this was done, it was competent for them to change their minds upon these items, to rehear the parties, and to revise their decision. The announcement was interlocutory, and not final. It is therefore unnecessary to consider whether any partial award, made and published under a submission such as this is, would preclude a party from revoking the authority of the arbitrators to proceed, under the submission, to consider and determine the remainder of the matters submitted.

*Exceptions overruled.*¹

¹ In *Tobey v. County of Bristol*, 3 Story, 800, 819, STORY, J., said: "But supposing it to be otherwise, and here there was a real contract or agreement, not conditional but absolute, on the part of the commissioners, to refer the claims to arbitration, can such an agreement be enforced by a court of equity? No one can be found, as I believe, and at all events, no case has been cited by counsel, or has fallen within the scope of my researches, in which an agreement to refer a claim to arbitration, has ever been specifically enforced in equity. So far as the authorities go, they are altogether the other way. The cases are divided into two classes. One, where an agreement to refer to arbitration has been set up as a defence to a suit at law, as well as in equity; the other, where the party as plaintiff has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defence against the suit; and have declined to enforce the latter as ill-founded in point of jurisdiction. In respect to the former class, I will barely refer to *Wellington v. Mackintosh*, 2 Atk. 569, *Mitchell v. Harris*, 4 Bro. Ch. R. 311; s. c. 2 Ves. Jr. 129, *Kill v. Hollister*, 1 Wils. R. 129, *Street v. Rigby*, 6 Ves. 815, and *Thompson v. Charnock*, 8 Term R. 139. In respect to the latter class. In *Street v. Rigby*, 6 Ves. R. 813, 818, LORD ELDON significantly said, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators, or that any discussion upon it has taken place in experience

WILLIAMS v. THE LONDON COMMERCIAL EXCHANGE COMPANY.

IN THE EXCHEQUER, MICHAELMAS VACATION, 1854.

[Reported in 10 Exchequer, 569.]

THE first count of the declaration stated, that the plaintiff employed the defendants in the way of their business as share-brokers, for commission to be paid by the plaintiff to the defendants in that behalf, to purchase for the plaintiff, when and as soon thereafter as the defendants could, one hundred shares in the Great Northern Railway Company, at the market price of such shares for the time being; and although the defendants then could and ought to have purchased for the plaintiff such shares, at the then market price thereof, the defendants did not then purchase such shares, or any part of them, but fraudulently and wrongfully neglected and omitted to do so, &c. — There were other counts in respect of other shares.

Plea — That, after the accruing of the causes of action in the declaration mentioned, and before the making of the agreement hereinafter mentioned, disputes and differences were existing between the plaintiff and the defendants touching and concerning divers dealings and transactions which had taken place between them, and touching certain matters of account arising out of those dealings and transactions; and that some of the said matters consisted of the several transactions in the declaration mentioned as to the direction to purchase shares for the plaintiff, and others of such matters were the subject of an action then depending in this Court by the plaintiff against the defendants for damages claimed by the plaintiff in respect of certain other dealings between the plaintiff and the defendants, and certain other directions

for the last twenty-five years; and he referred to the case of *Price v. Williams*, before LORD THURLOW, in which he, LORD ELDON, was counsel, where LORD THURLOW held, that the court could not perform such an agreement. I do not find in the very brief and unsatisfactory reports of the case of *Price v. Williams*, 3 Bro. Ch. R. 163, and 1 Ves. Jr. R. 365, any notice of this point; but there cannot be any serious doubt of the accuracy of LORD ELDON's recollection of the case. In *Gourlay v. The Duke of Somerset*, 19 Ves. R. 430, SIR WILLIAM GRANT, one of the greatest masters of equity of his age, expressly said, that a bill seeking to enforce the specific performance of an agreement to refer to arbitration, was a species of bill that has never been entertained by a court of equity. There are several other cases bearing strongly on the same doctrine, such as *Milnes v. Gery*, 14 Ves. 400, *Blundell v. Brettargh*, 17 Ves. 232, and *Wilks v. Davis*, 3 Meriv. R. 507. But a later case, directly in point, is *Agar v. Macklew*, 2 Sim. and Stu. R. 418, where SIR JOHN LEACH utterly refused to decree the specific performance of an agreement to refer to arbitration. On that occasion, he said: 'I consider it to be quite settled, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such a case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement.' See further *Ames Cas. Eq. Jur.* 65-68.

by the plaintiff to the defendants to purchase for the plaintiff certain other shares. Whereupon, the said disputes and differences then existing and the said action depending as aforesaid, it was agreed between the plaintiff and the defendants, that, in consideration that the defendants would consent to a judge's order, by which the matters of the said action should be referred to the award of C. C., and that the defendants would agree to perform in all things his award, to be made of and concerning the matters so to be to him referred, so far as the same award should direct performance to be made by the defendants, the plaintiffs should and would accept such agreement by the defendants in full satisfaction of all damages sustained by the plaintiff for and in respect of the several causes of action in the declaration in this action alleged. — *Averments*: That, in pursuance of the said agreement, a judge's order in the said then depending action was consented to by the defendants, and was made by Sir T. J. Platt, Knight, one of the Barons of this Court, whereby, and by consent of the plaintiff and the defendants, the matters of the said then depending action were referred to the award of the said C. C., and whereby it was ordered that the costs of the said cause should abide the event of the said award, &c.; and the plaintiff did then accept such consent and such order made in pursuance of the said agreement, in full satisfaction and discharge of all damages by the plaintiff sustained for and in respect of the several causes of action in the declaration in this present action alleged. — The plea then proceeded to state that the arbitrator made his award, and found for the plaintiff, damages, £423 9s. 6d., which the defendants paid to the plaintiff, with costs.

Demurrer, and *joinder* therein.

Willes, in support of the demurrer. — The plea is bad, as an accord without satisfaction. An agreement to refer to arbitration an action then pending cannot operate as a satisfaction or release of other causes of action not included in that reference. [PARKE, B. — There is good consideration for the plaintiff's relinquishing those claims. The defendants consent to refer the action by a judge's order, which may be enforced by attachment. MARTIN, B. — Suppose a person has two claims against another, and he says to the latter, "If you will consent to refer the one claim, I will give up the other," surely such an agreement would be binding.] An accord must appear to be advantageous to the party, otherwise it is no satisfaction: *Bac. Abridg. tit. "Accord and Satisfaction" (A.)*. This reference is not more advantageous to the plaintiff than it is to the defendants. It cannot be considered that either party obtains by it more than he is justly entitled to in respect of the matters referred; consequently, there is nothing in satisfaction of the claims not included in the reference. [PARKE, B. — The matters in question could not have been referred unless by consent of both parties. Then, as it appears that there was a binding agreement to refer, that is a satisfaction of the other claims.]

Barstow appeared in support of the plea, but was not called upon to argue.

PRES. CURIAM. — There must be judgment for the defendants.¹

Judgment for the defendants.

CALVIN ROBINSON v. FERDINAND HAWKINS.

VERMONT SUPREME COURT, FEBRUARY TERM, 1866.

[Reported in 38 Vermont, 693.]

PECK, J.² [The action is trespass for the taking and conversion of a cow. The defendant justified as deputy sheriff under a writ of attachment in favor of one Gilson. The plaintiff claims that the cow was his only cow and therefore exempt. The referee so finds the fact.]

The defendant relies on a submission and award of an arbitrator between the plaintiff and Gilson, as a bar to the action. It appears that in 1858, while the suit in which the cows were attached was pending in the county court, to which it had been appealed, Calvin Robinson, 2d, and his father, William Robinson and Gilson executed mutual bonds of submission to arbitration, in pursuance of which an award was made in May, 1859. The arbitration bonds specify as a matter of difference submitted, a "disagreement relative to the sale and purchase, or rent and occupancy, of certain premises, wherein the said Gilson claims damages of said Calvin Robinson, which disagreement has resulted in a suit at law" (referring to the suit already mentioned), and also specifying a claim on the part of the said William Robinson, that Gilson has, by deputy sheriff Hawkins, attached a certain cow claimed by William Robinson as his property, for which Robinson has a suit pending against Gilson. To this particular description of the matters submitted is added a general clause of all matters existing between Gilson and William Robinson, and between Gilson and Calvin Robinson. The defendant's counsel insists that, under this general clause, the plaintiff was bound to present the claim embraced in this suit before the arbitrator and have it there adjudicated, and that if he neglected to do so he is barred of all remedy, not only as against Gilson but as against this defendant. We recognize the principle established by the cases cited in argument, that under a general submission of all matters existing between the parties, if a party withholds a part of his claims from the arbitration he cannot, as a general rule, afterwards enforce it against the other party to the submission. Whether this rule is limited to cases where a party, in bad faith and intentionally in violation of his contract, withholds a claim, it is not necessary to decide. Nor is it necessary to decide what

¹ PARKER, B., PLATT, B., and MARTIN, B.

² The statement of facts in the opinion is abbreviated and a portion is omitted.

exceptions there are to this rule as between the parties to the submission. It is sufficient to say that, in the opinion of the court, the neglect of the plaintiff to present this claim before the arbitrator does not operate to bar him from his remedy against the defendant, who was no party to the submission. The cases on this subject, in which it is held that the party is concluded, proceed upon the ground that the party was bound, by his contract of submission, to present the claim and have it adjudicated by the arbitrator. We think in this case the plaintiff was not bound by the submission to present the claim before the arbitrator, but had a right to look to the officer who actually committed the trespass. It is true he might have made Gilson liable for the acts of the officer if he could have shown that Gilson directed the officer to attach and sell the particular cow in question, but he was not bound to resort to him instead of the officer for remedy. The submission and award is no bar to a recovery, without showing that the matter was submitted to and adjudicated by the arbitrator, and this the referee says he does not find.

The defendant's counsel claims that the presumption is that it was presented to, and adjudicated by, the arbitrator, unless the contrary is shown. This would be so if by the terms of the submission it became the duty of the plaintiff to present it to the arbitrator, but not so in this case.

SECTION VI.

SURRENDER AND CANCELLATION.

CROSS v. POWEL.

IN THE COMMON PLEAS, TRINITY TERM, 1696.

[*Reported in Croke Elizabeth, 483.*]

DEBT. The case was, A deed-poll was made between Cross and Powel, whereby Cross covenanted with Powel to assure unto him such land, and Powel by the same deed covenanted with Cross to pay unto him for it £40. Powel delivered the deed first to Cross, and Cross afterwards delivered it to Powel. Cross brings debt for this £40. And all this matter being disclosed by pleading, it was thereupon demurred by the defendant, pretending, that by this re-delivery of the deed unto him it had lost its force. — But all the Court held, that it is a good deed to both; for here is a writing, sealing, and delivery, and the delivery thereof to the defendant is not material: for if a deed be delivered to be cancelled, to the party himself, yet if it be not cancelled, and the other gets it again, it remains a good deed. Wherefore it was adjudged for the plaintiff.

ALBERT'S EXECUTORS v. ZIEGLER'S EXECUTORS.

PENNSYLVANIA SUPREME COURT, 1857.

[*Reported in 29 Pennsylvania State, 50.*]

KNOX, J. We are of opinion that the Court of Common Pleas erred in permitting the jury to find under the evidence, that the single bill upon which this suit was brought, did not truly express the contract between the parties to it.

There was no evidence of either fraud or mistake in the execution and delivery of the instrument, and therefore it could not be contradicted or varied by parol. The plaintiff has the right to a trial upon the basis that the contract was correctly set forth in the instrument upon which the suit was brought. That instrument was in the following words:—

“Know all men by these presents, that I, John Ziegler, of Latimore township, Adams county, Pennsylvania, do promise to pay to Jacob Albert, of the same place aforesaid, the full interest of \$1500, one year and every year until the said Jacob Albert's decease: I, John Ziegler, bind myself, my heirs, executors, and administrators for the same, it being for value received, as witness my hand and seal the first day of April, A. D. 1833.

Signed, “JOHN ZIEGLER, [L. s.]”

Jacob Albert died on the 5th September, 1851; so that, according to the terms of the contract, the plaintiff was entitled to recover the interest on \$1500, from the first day of April, 1833, to the 5th September, 1851. But the defendant alleges that the instrument upon which the suit was brought, was cancelled by Jacob Albert in his lifetime: first, by an indorsement upon the back of the paper; and second, by his direction to have the paper burned.

The indorsement was without date and was not signed, but was proved to be in the handwriting of the present plaintiff, who was the executor and the only person interested in the estate of Jacob Albert. It was as follows:—

“This within obligation after my decease shall be of no effect, but till then to be and remain in full force and virtue.”

Whether this indorsement was made by the direction of the testator, was a question of fact for the jury. If so made, its legal effect was for the court. The plaintiff asked the court to instruct the jury that the indorsement, even if proved to have been made by the holder, would not amount to a release of the interest stipulated to be paid; to which an affirmative answer was given. This was correct. For although the bond could be released in equity by parol, it could only be done by delivery and upon sufficient consideration. That natural love and

affection is not a sufficient consideration, is conclusively established by the cases of *Kennedy's Executors v. Ware*, 1 Barr, 445, and *In re Campbell's Estate*, 7 Barr, 100. And that there was no delivery is proved by the indorsement itself, for the bond was to remain good until Jacob Albert's decease.

The reason why a parol release of a sealed instrument is good in equity, is because it is there treated as an agreement not to sue, and is executed specifically by a perpetual injunction. But there must be a contract to release, founded upon a sufficient consideration, otherwise it is at the most only an executory gift, subject to the control of the donor, and which can neither be enforced against him nor his personal representative. It is clear, therefore, that the indorsement upon the single bill was not a valid release of the debt, nor would the mere unexecuted testamentary direction for the destruction of the instrument amount to an extinguishment of the debt. But the cancellation of a bond, or its delivery to the obligor, or even to a stranger, with the intent that it shall be cancelled, amounts to an extinction of the debt: *Lacey v. Lacey*, 7 Barr, 251. If therefore the jury should be satisfied upon another trial, that Jacob Albert in his lifetime gave the bond in question to his grandson, Hiram Albert, and told him to burn it, it would in effect be cancelled and the debt extinguished; and the subsequent preservation of the bond, and the institution of this suit upon it by John E. Albert against the manifest intention and express direction of his father, would be a fraud upon the estate of John Ziegler, which could not be permitted to succeed in a court of justice. If however this allegation is not satisfactorily established, we see nothing in the case, as now presented, which would prevent the plaintiff from recovering the amount of his claim.

The indorsement upon the single bill, that it should be of no effect after the holder's death, as well as the declarations of Jacob Albert testified to by John Trump, Jacob Furst, Lewis Myers, and others, although not evidence to vary the written instrument, nor to establish an independent defence, may properly be received as corroborative to the testimony of Nelson Day. For the often repeated declarations of the plaintiff's testator, that he did not intend to claim anything upon the bond from the estate of his deceased son-in-law, John Ziegler, tends to the more ready belief in his direction for its destruction.

*Judgment reversed and venire de novo awarded.*¹

¹ Surrender of a bond to the obligee with intent to extinguish the obligation has the intended effect. *Hurst v. Beach*, 5 Madd. 351; *Beach v. Endress*, 51 Barb. 570; *Picot v. Sanderson*, 1 Dev. 309; *Wents v. Dehaven*, 1 S. & R. 317; *Lacey v. Lacey*, 7 Pa. St. 251.

MARSTON, ADM., APPELLANT, v. MARSTON & ANOTHER.

NEW HAMPSHIRE SUPREME COURT, JUNE, 1886.

[Reported in 64 *New Hampshire*, 146.]

APPEAL, from a *pro forma* decree of the judge of probate, charging the appellant with the amount of two notes signed by Orissa J. Pillsbury, two notes signed by L. D. Kelly, and one note signed by Anson R. Marston, all payable to his intestate, Mercy Marston.

Aldrich & Remich, for the appellant.

Drew & Jordan and *R. Farnham*, for the appellees.

SMITH, J.¹ In November, 1878, Mrs. Marston made known her desire and purpose to give to her son the plaintiff, and to her daughter Mrs. Pillsbury, the promissory notes which she held against them. That purpose she understandingly carried into effect by the transfer to them of the possession of the notes, without condition or reservation. The transaction was intended by her and understood by them to be a complete delivery of the notes, operating as an absolute extinguishment of all claim against them as signers of the notes. None of the elements to constitute a valid gift *inter vivos* were wanting. The gift was by a person competent to give, of property she had a right to give, to persons competent to receive, and was completed by an absolute and unconditional transfer of the possession of the thing given. The gift having been perfected by delivery and acceptance, became an executed contract, founded in mutual consent, irrevocable by the donor, and the notes became the absolute property of the donees. Creditors only could interfere, but there is no suggestion that there were any.

The redelivery of the notes to Mrs. Marston subsequently on the same day was not a revocation of the gift, for it is found as a fact, and the paper drawn up by Mr. Herbert and signed by her shows, that the parties did not understand that the gift was revoked, and did not intend to revest the title to the notes in her, except in the contingency which has never happened. Nor was the redelivery a gift *inter vivos* from the children to their mother; the facts show that was not what the parties intended; and besides, a gift of the donor's promissory note may be avoided. If the reissue of the notes was intended as security for their agreement to support their mother, the answer is, there was no valuable consideration for the agreement. 3 Pars. Count. 362.²

Decree of probate court reversed.

¹ Most of the statement of facts and a portion of the opinion have been omitted.

² Surrender of a note to the maker with intent to extinguish it has the intended effect. *Sherman v. Sherman*, 3 Ind. 337; *Gibson v. Gibson*, 15 Ill. App. 328; *Denman v. McMahon*, 37 Ind. 241, 246; *Peabody v. Peabody*, 59 Ind. 556; *Slade v. Mutrie*, 156 Mass. 19; *Stewart v. Hidden*, 13 Minn. 43; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Larkin v. Hardenbrook*, 90 N. Y. 333; *Jaffray v. Davis*, 124 N. Y. 164, 170;

DARLAND v. TAYLOR.

IOWA SUPREME COURT, DECEMBER 6, 1876.

[Reported in 52 Iowa, 503.]

DAY, J. [The plaintiff as administrator of Alsey Darland sues for the price of a certain piece of land sold by her to the defendant. Promissory notes were given by the defendant for this money, but shortly before her death Alsey Darland destroyed the notes, and informed her son of the fact, and that she had done it because she did not want the defendant to have those notes to pay on her death. There was no evidence that the defendant knew of the destruction. The court below gave judgment for the plaintiff.]¹

The court grounded the opinion that the declaration of the donor is in itself insufficient to establish a gift *Burney v. Ball*, 24 Ga., 565. What is there said upon the subject is as follows: "Our opinion is that the declarations of the donor that he had given are always admissible in evidence in cases of this sort. We have heretofore held, and still hold, that they are insufficient of themselves to establish a gift. To constitute a good and valid gift there must be a delivery, actual or constructive, or, as it is termed sometimes, symbolical, or a writing." It is evident from the foregoing that the court simply determined that the declarations of a donor that he had made a gift are not sufficient without some proof of delivery, actual or constructive. It is not held, nor intimated, that the declaration of the donor is not admissible to establish the facts from which a delivery may be inferred. That such facts may be established by the declaration of the donor we do not doubt.

The court further held that there was no delivery or acceptance of the gift, and that both are necessary. The authorities hold that the delivery may be actual or symbolical. In *Granigan v. Arden*, 10 Johnson, 292, a father bought a ticket in a lottery, which he declared he gave to his daughter, and wrote her name upon it. After the ticket had drawn a prize he declared that he had given the ticket to his child, and that the prize money was hers. This was held sufficient to authorize a jury to infer all the formality requisite to a valid gift, and that the title to the money was complete and vested in the daughter. In *Gardner v. Gardner*, 22 Wendell, 525, a debt contracted by the wife was held to be discharged, as a gift, *causa mortis*, by the husband's destroying the bond, the evidence of the debt, and declaring that the money was hers. See, also, *Blaisdel v. Locke*, 52 N. H. 238.

In *Hillebrant v. Brewer*, 8 Texas, 45, where the father branded certain cattle in his son's name, and recorded the brand, it was held suf-

Kent v. Reynolds, 8 Hun, 559; *Bridgers v. Hutchins*, 11 Ired. 68; *Melvin v. Bullard*, 82 N. C. 33; *Dittoe's Adm. v. Cluney's Ex.*, 22 Ohio St. 436; *Ellsworth v. Fogg*, 35 Vt. 355; *Lee's Ex. v. Boak*, 11 Gratt. 182.

¹ The statement of facts in the opinion has been abbreviated.

ficient to establish a symbolical delivery. The destruction of the notes, together with the repeated declarations of the deceased that she did not intend the defendant to pay the debt, constitute a sufficient delivery under the authorities cited. As the gift was for the benefit of the donee and coupled with no condition, his acceptance of it, from all the circumstances proved, in the absence of any opposing testimony, must be presumed. *Blaisdel v. Locke*, 52 N. H. 238 (244).

The court further held that the gift was made by the donor in apprehension of death before morning, and that, as she did not die, there was a revocation of the gift. The evidence does not at all sustain the position that the gift was intended to be operative only in the event of the death of the donor before morning. Upon the contrary the evidence clearly shows that the deceased desired to discharge the defendant from liability upon the notes, and that the destruction of the notes was made at the time in question because she feared that she might die before morning, and thus be prevented from discharging the defendant as she desired. Afterward, and during her last sickness, and but a short time before death, the deceased declared that she had destroyed the notes so that W. H. Taylor would get the property, and that she intended him to have it. There was not, we think, any revocation of the gift.

The evidence we think establishes a completed and valid gift, *causa mortis*, of the amount of the notes in question.

Reversed.

SECTION VII.

ALTERATION.

HENRY PIGOT'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1614.

[Reported in 11 Coke, 26b.]

BENEDICT WINCHCOMBE, Esq. brought an action of debt against Henry Pigot, which was entered Trin. 11 Jac. Regis, Rot. 566, in Banco Regis on a bond made to the plaintiff in £60 2 Martii, anno 8 Jac. Regis. The defendant, without demanding oyer of the bond or condition, pleaded *non est factum*. And the jury gave a special verdict to this effect, that the bond was made to the plaintiff in the same

¹ Destruction of a note operates as a discharge of the maker. *Gilbert v. Wetherell*, 2 Sim. & St. 358; *McDonald v. Jackson*, 56 Iowa, 643; *Fisher v. Mershon*, 3 Bibb, 527; *Van Auken v. Hornbeck*, 2 Green, 178; *Blade v. Noland*, 12 Wend. 173. So of a bond, *Gardner v. Gardner*, 22 Wend. 526; *Bond v. Bunting*, 78 Pa. 210, 218; *Rees v. Rees*, 11 Rich. Eq. 86.

manner as he had declared, and found the bond in these words, Noverint universi per præsentes nos Georgium Watkins Generos' Henricum Pigot de civitate Oxon' Draper, et Johannem Pyme de eadem civitate, Cordwayner, teneri et firmiter obligari Benedicto Winchcombe Armig' in 60 libris, &c. And in truth the plaintiff was Sheriff of the county of Oxford; and the condition of the bond was, that the said George Watkins should appear in the King's Bench *mense Paschas* to answer to George Cottle in a plea of trespass; and that the said bond was delivered by the said Henry Pigot as his deed to the use of the plaintiff; and that after the delivery of the said deed hæc verba sequentia, videlicet (Vicecom' Comitatus Oxon') insert' et interlineat' fuerunt in eodem scripto post prædicta verba (Benedicto Winchcombe Armig') et ante prædicta verba (in sexaginta libris) superius in obligatione prædicta mentionat', sine notitia, Anglice the privy, seu mandat' prædict' Benedicti, et utrum super tota materia, &c. videbitur justic' et cur' hic quod scriptum præd' sit factum præd' Henrici necne iidem jur' penitus ignorant, et petunt advisamentum cur' hic, &c.

And in this case these points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privy of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void: as if a bond is to be made to the Sheriff for appearance, &c. and in the bond the Sheriff's name is omitted, and after the delivery thereof his name is interlined, either by the obligee or a stranger, without his privy, the deed is void: so if one makes a bond of £10 and after the sealing of it another £10 is added, which makes it £20, the deed is void: so if a bond is rased, by which the first word cannot be seen, or if it is drawn with a pen and ink through the word, although the first word is legible, yet the deed is void, and shall never make an issue, whether it was in any of these cases altered by the obligee himself, or by a stranger without his privy. So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privy, alters the deed by any of the said ways in any point not material, it shall not avoid the deed. *Vide* Dyer, 9 Eliz. fol. 261 b. And therefore in the principal case, the addition made by a stranger, without the privy of the plaintiff, being in a point not material for anything that appears to the court; for this cause, judgment was given for the plaintiff; and so you will the better understand the book in 14 H. 8, fol. 25 b.

And in this case it was moved at the bar, when a deed shall be good in part, and void in part: as to that, I conceive, there is a difference when a deed is void *ab initio*, and when it becomes void by misfeasance

ex post facto. Also there is a difference when the deed, which is void in part *ab initio*, doth consist upon the entirety, and when upon divers several clauses: and in these also there is a difference, when the several clauses are absolute and distinct, and when they are several, and yet the one has dependency upon the other.

As to the first, it is unanimously agreed in 14 H. 8, 25, 26, &c. that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful; that in this case, the covenants or conditions which are against law are void *ab initio*, and the others stand good.¹

But if a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto*, avoids the whole deed, as it is held in 14 H. 8, 25, 26. For although they are several covenants, yet it is but one deed, 3 H. 7, fol. 5. a. If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both. *Vide* the case of *Matthewson*, Mich. 39 & 40 Eliz. in the Fifth Part of my Reports, fol. 28 a.²

DAVIDSON, PUBLIC OFFICER, &c. v. COOPER & BRASSINGTON.

IN THE EXCHEQUER CHAMBER, JULY 6, 1844.

[Reported in 13 Meeson & Welsby, 343.]

LORD DENMAN, C. J. This was a declaration in assumpsit on a written guarantee, to which one defendant pleaded, that, while the guarantee was in the plaintiff's hands, it was, without the defendant's consent or knowledge, materially altered by the addition of two seals opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue being taken on this plea, the jury found it was so altered; and judgment has been given by the Court of Exchequer for the defendant, after having discharged a rule for judgment, *non obstante veredicto*, upon argument.

After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instru-

¹ Portion of the case is here omitted.

² In *Bayly v. Garford*, March, 125, the seals of two obligors on a joint and several bond had been eaten by mice and rats, but the seal of the defendant's testator had not been. The court "did strongly incline that judgment ought to be given for the defendant, and their reason was that if the obligee by his act or own laches discharge one of the obligors, where they are jointly and severally bound, that the same discharges them all, but gave day for the further debating of the case, for that this was the first time it was argued."

ments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's Case has been overruled, is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed.

*Judgment affirmed.*¹

SECTION VIII.

MERGER.²

HIGGENS'S CASE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1605.

[Reported in 6 Coke, 44 b.]

IN debt by Randal and his wife executrix of Themilthorp against Higgins, on a bond made to the testator, the defendant pleaded that

¹ The rule in Pigot's Case was applied to bills of exchange and promissory notes in Master and Miller, 4 T. R. 320, 2 H. Bl. 141, and has been frequently applied to such instruments. See Ames Cas. B. & N., I. 447, Bills of Exchange Act, § 64.

In the United States, alteration by a stranger has been held not to avoid a contract. Ames Cas. B. & N., I. 447; 2 Am. & Eng. Encyc. of Law (2d ed.), 214. The Negotiable Instruments Law (§ 124) has, however, copied the English rule. See 16 Harv. L. Rev. 260.

The rule against alteration is applicable to simple written contracts. Powell v. Divett, 15 East, 29; Forshaw v. Chabert, 3 Brod. & B. 156; Nichols v. Johnson, 10

² See 20 Am. & Eng. Encyc. of Law (2d ed.), 596-600.

the testator in vita sua in curia de Banco hic recuperavit debitum prædictum, ac 60 s. pro damnis (without alleging any execution), quod quidem recordum recuperationis, was removed extra Bancum per br. de errore coram Rege, & ibidem remanet minime reversatum seu adnullatum; and thereupon it was demurred. And it was objected, that if a man recovers debt on a bond, or rent on a lease for years, it is at the plaintiff's election to sue execution on that judgment, or to have a new action; and that for divers reasons. 1. By the judgment, the deed or rent is not changed, but continues a deed and a rent notwithstanding the judgment; as if a man be indebted in arrearages on accompt, and takes a bond for the payment of them, yet he may have an action on the one or the other, as it is agreed in 11 H. 4 and Mich. 2 Jac. Rot. 3272, in this court, in debt by Richard Branthwait against Sir William Cornwalleyes the younger, on a bond for payment of money, the defendant pleaded in bar, *quod querens post diem solutionis pecuniæ*, and before the purchase of the writ did accept of a statute-staple for the same debt, and in full satisfaction of the bond, on which the plaintiff demurred: and it was adjudged for the plaintiff. For although he had taken a statute for the same debt, which is a matter of record, and of a higher nature than the bond is, yet the bond did remain in force; and it was in the plaintiff's election to take his action or remedy on the one or the other. 2. It was objected, that it would be against reason to compel the plaintiff to sue execution on the first judgment, for perhaps the plaintiff knows that the first judgment is erroneous, or that he has recovered by false oath, in which case the judgment is reversable by error, or attain, and therefore if he should sue execution it would be in vain; for he ought to restore (when the judgment is reversed) all that which he has received. 3. It was objected, if in debt on a bond the defendant denies his deed, and it be found his deed, in that case the deed shall be delivered to the plaintiff, and the reason is, to the end that he may have a new action if he will: but if it be found not his deed, the deed ought always to remain in court, till the plaintiff has reversed the judgment. *Vide* 9 E. 4, 50 a, b. 4. If two be bound in a bond jointly and severally, and the obligee recovers against one of them on this bond, the nature of the bond is not so changed by this recovery but he may on the same bond have an action against the other. But it was resolved, that as long as the judgment remains in force, he cannot have a new action upon the same bond; for as he who has a debt by simple contract, and takes a bond for the same debt, or any part of it, the contract is determined, 3 H. 4, 17 b, 11 H. 4, 79, b, 9 E. 4, 50, b, 51, a. So when a man has a debt on a

Conn. 192; *Baxter v. Camp*, 71 Conn. 245; *Johnson v. Brown*, 51 Ga. 498; *Kline v. Raymond*, 70 Ind. 271; *Andrews v. Burdick*, 62 Iowa, 714, 720; *Davis v. Campbell*, 93 Iowa, 524; *Lee v. Alexander*, 9 B. Mon. 25; *Osgood v. Stevenson*, 143 Mass. 399; *Consaul v. Sheldon*, 35 Neb. 247; *Meyer v. Huneke*, 55 N. Y. 412; *Martin v. Tradersmen's Ins. Co.*, 101 N. Y. 498; *Cline v. Goodale*, 23 Oreg. 406; *American Pub. Co. v. Fisher*, 10 Utah, 147; *Schwalm v. McIntyre*, 17 Wis. 232.

bond, and by ordinary course of law has judgment thereon, the contract by specialty which is of an inferior nature, is by judgment of law changed into a matter of record, which is of a higher nature. 2. If he who recovers may have a new action and a new judgment he may have infinite actions, and infinite judgments to the perpetual vexation and charge of the defendant and *in finitum in jure reprobatur*. 3. On every judgment the defendant shall be amerced, and if he be a duke, marquis, earl, viscount or baron, he shall be amerced to one hundred shillings, and so the defendant might be infinitely amerced on one and the same obligation, which would be mischievous, and *interest reipublicæ ut fit finis litium*. And if a man has a liberty by prescription, and takes letters patent thereof, the matter of record drowns the prescription which was the inferior, as it is held in 33 H. 8 Br. Prescription 102. *Vide* 10 H. 7, 21, a, b, & 24, b, 2 E. 4, 14, b, 22 H. 6, 56, 8 H. 4, 16, 34 H. 6, 26, &c. And if a man has an annuity by deed or prescription, and brings his writ of annuity and has judgment so long as this judgment doth remain in force, he shall never have a writ of annuity (although it be an annuity of inheritance), but a *Sc. fac.* on that judgment; because the matter of the specialty or prescription, is by the judgment altered into a thing of a higher nature. *Vide* 37 H. 6, 13, b, judgment in an action of forgery of a false deed, is a good bar in another action on the same forgery. But if recovery be in debt on a bond in the county by justices, there, notwithstanding such judgment, the plaintiff may have an action of debt on the bond in a court of record; for the county court is not of record, and therefore the bond is not changed into anything of a higher nature; but so long as such judgment remains in force the plaintiff shall not have another action by justices in the same court for the infinite vexation of the party, as hath been said.

And as to the said case of Branthwait it was agreed to be good law; for a statute-staple, or bond in the nature thereof, is but a bond recorded, and one bond, be it of record, or not of record cannot merge another. Also a bond, and bond in the nature of a statute-staple are two distinct liens, made by assent of the parties without process of law, whereof the one hath no dependency on the other. But in an action brought on a bond, the suit is grounded on the bond, as a building upon a foundation; and the plaintiff hath judgment to recover the debt due by the bond; so that by judicial proceeding, and act in law, the debt due by the bond is transformed and metamorphosed into a matter of record; and judgment in a court of record is of a higher nature than a statute-staple, statute merchant, or any recognizance acknowledged by assent of the parties, without judicial proceeding. And as to the objection which was made, that perhaps the recovery is erroneous; to that it was answered, that that was the plaintiff's fault, and although it be erroneous, yet so long as it remains in force, it ought to be executed; and when it is reversed, then the obligee is restored to his new action on the bond. And it is true, that in old

books, after judgment given in an action of debt on a bond; the bond shall be damned, because the duty was changed into another nature, and that was the true reason of the old books, and not the reason which Brook supposes in abridging the case of 11 H. 4, Faits 19, that otherwise the obligee might again recover thereupon. And therewith agree 9 E. 4, 51, a, 7 H. 4, 39, b, 11 H. 4, 73, b, 45 E. 3, 11, &c. And the court had consideration of the book in 17 E. 3, 24, where Edward Devon brought an action of debt on a bond of £20 against Richard Scot, who pleaded, that before the mayor and bailiffs of Newcastle upon Tyne, the plaintiff by plaint on the same bond, recovered and had execution; and there, because the defendant did not procure the bond to be damned, the plaintiff had judgment to recover again, notwithstanding the former judgment and execution. And there Shard said to the defendant, see now the deed be damned. But the court said, that that judgment was given because it was the defendant's folly that the deed was not damned on the former judgment. For in the time of E. 3, R. 2, and H. 4, it was held, that when a man did recover on a bond, that the bond (as hath been said) should be damned. Wherein the content and quietness of men in old times ought to be observed, that when judgment was given against them by course of law, they were satisfied therewith, without prying with eagles' eyes into matters of form, or the manner of proceeding, or of the trial, or insufficiency of the pleading, &c. to the intent to find error to force the party to a new suit, and himself to a new charge and vexation. But since men became more contentious, and not satisfied with any trial or judgment, but writs of error and attainments (which in old times were rare, and especially writs of error) were so frequent, as of more late time they were, the judges thought it dangerous to cancel the deed, either where the plaintiff recovered, or where he was barred by judgment, for in both cases the judgment might be reversed by error or attainment, and therefore the reason or cause of the said judgment in 17 E. 3 is now changed, and there is not any question but judgment and execution upon a bond, is a good bar in a new action thereupon; and therefore the said book of 17 E. 3 is not to be urged against this judgment. Also the court said, that if a man brings an action of debt on a bond, and is barred by judgment, so long as the judgment stands in force, he cannot have a new action: *pari ratione* when he hath judgment in an action on the same bond so long as the judgment stands in force, he shall not have a new action. And as to the case which has been objected, that where two are bound jointly and severally, and the obligee has judgment against one of them, that yet he may sue the other, it was well agreed. For against him the nature of the bond is not changed, for notwithstanding the judgment, he may plead that it is not his deed. And afterwards in the case at bar, judgment was given against the plaintiff, and the doubt in 9 E. 4, 50, b, 51, a, where this matter is very well debated on both sides, well resolved.

WILLIAM RUNNAMAKER v. HENRY CORDRAY.

ILLINOIS SUPREME COURT, JUNE TERM, 1870.

[Reported in 54 Illinois, 303.]

WRIT OF ERROR to the Circuit Court of Jasper county; the Hon. HIRAM B. DECIUS, judge, presiding.

The opinion states the case.

Mr. John H. Halley, for the plaintiff in error.

Mr. W. B. Cooper, for the defendant in error.

MR. JUSTICE WALKER delivered the opinion of the Court:

This was an action of debt, brought by plaintiff in error in the Jasper circuit court, against defendant in error. A declaration was filed containing the common counts; he also sued out a writ of attachment. At the return term, defendant filed the plea of *nil debit*, and issue was joined. The cause was submitted to and tried by the court, without the intervention of a jury, by consent of the parties. On the trial, plaintiff in error proved that soon after defendant in error came to the county, the transcript of a judgment from a justice of the peace in the State of Ohio, against defendant in error, was presented to him, and that he promised to pay it, but soon afterwards, said it was unjust, but he would pay it; and again, that he would pay it as soon as he could. He also introduced evidence, that defendant had said to different persons, that the judgment had followed him, and that he wanted to place his property in their hands to avoid its payment.

He then offered to read the transcript of a judgment for \$130.50 and costs against defendant in error, rendered by a justice of the peace of Coshocton county, in the State of Ohio, in evidence, but, on objection, it was rejected by the court; and thereupon the court rendered a judgment for defendant in error for costs. Plaintiff entered a motion for a new trial, which was overruled, and he brings the record to this court and asks a reversal.

The first question presented, is, whether plaintiff could recover on the verbal promise of defendant to pay the judgment. Such a promise is without consideration, and cannot increase or change the liability of the debtor. The recovery of the judgment imposes the obligation to pay, and that obligation is in nowise increased or changed by the verbal promise. The verbal promise does not extinguish the binding force of the judgment. It remains unimpaired. Nor does the promise create a new debt or undertaking of binding force. If debt or assumpsit could be maintained on such a promise, an action could still be maintained on the judgment, thus giving two causes of action for one debt.

Nor can the original consideration, upon which the judgment was rendered, be recovered under the common counts.

That consideration was merged and extinguished by the higher security and obligation of record — the judgment. If it were not so,

then several actions might be maintained in different forms, at the same time, for the same debt.

Lastly, it is urged that the court erred in rejecting the record of the judgment as evidence. It is a familiar rule, that the allegation and proof must correspond; and we are at a loss to perceive how a judgment can support the money counts in debt. A judgment may be declared on as such, but it cannot be evidence of money had and received, loaned, paid out and expended, or of an account stated. It is only the finding by a court, that one person owes another a certain specified sum of money, and a sentence that it be collected from the debtor. We have searched in vain to find a precedent for such a recovery, counsel have referred to none, and it is believed that none exists. To recover, plaintiff in error should have declared, in the usual manner, in debt on the judgment, and then produced a transcript, properly authenticated, as evidence. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

BACON v. REICH.

MICHIGAN SUPREME COURT, JUNE 9 — OCTOBER 3, 1899

[*Reported in 121 Michigan, 480.*]

ASSUMPSIT by Elbridge F. Bacon against William Reich for goods sold and delivered. From a judgment for defendant, plaintiff brings error. Affirmed.

Bacon & Palmer, for appellant.

Louis C. Wurzer, for appellee.

HOOKEE, J. The defendant recovered a judgment against the Architectural Iron & Wire Works for a breach of a contract. He was afterwards sued by the assignee of the iron works for the price of the articles furnished to him under the contract, the assignment being made before his action for damages was instituted. In this action he sought to set off or recoup his damages, which was permitted by the trial court. The plaintiff has appealed the case, contending that the claim for damages is merged in the defendant's judgment, and therefore will not again support an action or defence, and that the judgment cannot be set off against the plaintiff, for the reason that there is a want of privity. It is also claimed that the plea was insufficient to warrant the admission of this proof.

It must be admitted that the plaintiff is not privy to the judgment, because he acquired his rights, whatever they are, before defendant began his action. *Bartero v. Bank*, 10 Mo. App. 76; *Powers v. Heath's Adm'r*, 20 Mo. 319; *Mathes v. Cover*, 48 Iowa, 512; *Todd v. Flournoy's Heirs*, 56 Ala. 99 (28 Am. Rep. 758); *Marshall v.*

Croom, 60 Ala. 121; Cook v. Parham, 63 Ala. 456; Coles v. Allen, 64 Ala. 98; Winslow v. Grindal, 2 Greenl. 64; Weed Sewing-Machine Co. v. Baker, 1 McCrary, 579; Bigelow, Estop. 135, 136. He is privy, however, to the injury upon which defendant's judgment rests. It is also true that the claim of the defendant was merged in the judgment against the iron works, and the judgment would be a bar to another action, or an attempt to recoup the damages, against the Architectural Iron & Wire Works. But the judgment could be set off in an action brought by the iron works, or an action might be brought upon it. We deem it unnecessary to cite authorities in support of these principles, which are elementary.

It is nevertheless true that the plaintiff took this claim subject to the equitable right of the defendant to have his damages applied upon it, and all that can prevent is the technical rule that they are merged in a judgment against plaintiff's assignor. Theoretically, this may be said to be no hardship, because, if the defendant shall pay the plaintiff's claim, he would yet have the right to collect his judgment for damages, which would work out exact justice to all. Practically, however, this is not so, because he cannot collect his judgment. The iron works is insolvent, and was at the time the plaintiff, who was a stockholder in the concern, took his assignment, and the defendant cannot collect his judgment in any other way than to set it off against his contract obligation. Furthermore, the record contains evidence that he was ignorant of the assignment at the time he took his judgment, and had a right to suppose that, by obtaining the judgment, he had settled the question of his liability on the contract, and was led to do so to avoid liability in a garnishment suit, which was adjourned for the purpose. But for the previous assignment, this would have been so, because the judgment would have bound all persons afterwards acquiring title to the claim from the iron works.

"According to more recent cases, the doctrine that claims become merged in judgments is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation, injurious to the defendant and of no benefit to the plaintiff." 15 Am. & Eng. Enc. Law, 339, and cases cited.

The doctrine, if rigorously applied, may work hardship and injustice, and it seems to be lawful to disregard it in some cases. Thus, a foreign judgment does not bar an action upon the original claim. Vanquelin v. Bouard, 15 C. B. (N. S.) 341; Wilson v. Tunstall, 6 Tex. 221; Wood v. Gamble, 11 Cush. 8 (59 Am. Dec. 135); New York, &c. R. Co. v. McHenry, 17 Fed. 414. See, also, Olcott v. Little, 9 N. H. 259 (32 Am. Dec. 357). In Eastern Townships Bank v. Beebe, 53 Vt. 177 (38 Am. Rep. 665), it is said that:

"A foreign judgment, when shown in evidence, upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudi-

cated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action."

In cases where, through mistake or fraud, it would be inequitable to treat such judgments as a bar, the doctrine cannot be invoked. The case of *Ferrall v. Bradford*, 2 Fla. 508 (50 Am. Dec. 293), is in point. We quote:

"The plaintiffs in the court below took judgment against only one of the joint obligors, and, when that fact is pleaded by the defendants in bar, they reply that they did only do so because their attorney was circumvented, and induced to dismiss the proceedings as to the other defendants, in consequence of the fraudulent representations of one of the defendants. It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defence, arising from a state of facts which they themselves, by their fraud, have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defence, to take advantage of their own wrong, — a defence admitted to arise from their own fraudulent act. The question now is, Will such a defence be available, tolerated, or allowed? Law, reason, justice, and morality unite in a negative response. . . . At the first blush, we thought we discovered some difficulty arising from the fact that only one of the defendants is alleged to have been guilty of the fraud; but it soon disappeared, for we find this principle broadly laid down, — that interests gained by one person by the fraud of another cannot be held by them; otherwise, fraud would always place itself beyond the reach of the court."

Clark v. Rowling, 3 N. Y. 216 (53 Am. Dec. 290), denies the unyielding character ascribed to merger, as shown by the following extract from the opinion of MR. JUSTICE HURLBUT:

"It is true that the notes, as evidence of an indebtedness, were merged in the judgment, which, being greater security, operated to extinguish the lesser; but does it therefore follow that the judgment to all intents became a new debt, and that the merger or extinguishment of the notes was so complete as that, for the purpose of protecting the defendants in an equity connected with their original indebtedness, we may not look behind the judgment, and see upon what it was founded? A judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt in a new form, so as to prevent a technical merger from working injustice. And this exception to the doctrine contended for by the plaintiff has obtained, especially in cases

of insolvency and bankruptcy, for the protection as well of the creditor as the debtor, and has been applied impartially for the benefit of both."

In *Stevens v. Damon*, 29 Vt. 521, it was held that:

"The judgment of the justice in such a suit will not be a bar to a subsequent suit for the recovery of the account of the plaintiff which was not presented, if its presentation was omitted by mistake, or for any other sufficient reason."

See *Cramer v. Manufacturing Co.*, 35 C. C. A. 508, 93 Fed. 636; *Fox v. Althorp*, 40 Ohio St. 322; *Kane v. Morehouse*, 46 Conn. 300 (closely resembles *Steven v. Damon*); *Wyman v. Mitchell*, 1 Cow. 316, and other cases cited in the case of *Clark v. Rowling*, *supra*; also, *Johnson v. Insurance Co.*, 12 Mich. 216 (86 Am. Dec. 49).

In the case before us, there is evidence from which it might be found that the course taken by the defendant in procuring a judgment for the breach of the contract was due to the concealment on the part of the iron works of the fact of the transfer of the claim, or, at least, of the mistake of the defendant in supposing that it belonged to the iron works at that time. We think the hardship and injustice of a strict application of the rule of merger is so apparent that we are justified in considering the case within the principle of the cases cited, and holding that, although the plaintiff was not strictly in privity as to the judgment, he was as to the cause of action upon which it was based, and that the defence made was proper. We think this conclusion renders it unnecessary to discuss the subject of election of remedies raised by the briefs.

The further point is made that the defence was not admissible under the pleadings. The case began in justice's court. The plea was presumably oral, and consisted of "the general issue, notice of set-off and recoupment." This was not a sufficiently definite plea, under the case of *Kerr v. Bennett*, 109 Mich. 546, but it was amendable, and, had attention been called to it, doubtless would have been amended.

The objections shown in the record do not indicate that the sufficiency of the plea was attacked. They are simply that certain questions and testimony were incompetent and immaterial. That might mean that the plea was insufficient, or that the defence of recoupment could not be proved because of the former judgment, which seems to have been, then, as here, the main contention. Such objections are admirably adapted to the concealment of the real point relied upon, and we have often held that they will not justify a reversal. The authorities are collected in the recent case of *Detzur v. Brewing Co.*, 119 Mich. 282.

The judgment should be affirmed.

MOORE and LONG, JJ., concurred with HOOKER, J.

GRANT, C. J. (*dissenting*). This suit is originated in justice's court. Defendant entered into a contract with the Architectural Iron & Wire Works, a corporation, by which it agreed to furnish defendant certain iron trusses for the sum of \$400. The iron works, being indebted to the plaintiff, assigned the amount due upon the contract to him. The justice returned that "the defendant pleads the general issue, notice

of set-off and recoupment." Defendant, claiming a breach of contract, sued the iron works, and recovered a judgment for \$358 damages, from which no appeal was taken, and the judgment remained in full force and effect. It was admitted that \$100 was due upon the contract. The court permitted the defendant to recoup damages, and verdict and judgment were rendered for him.

1. The notice of recoupment was too indefinite to permit any evidence under it. *Kerr v. Bennett*, 109 Mich. 546; *Roethke v. Brewing Co.*, 33 Mich. 340; *Delaware, &c. Canal Co. v. Roberts*, 72 Mich. 49; *Darrah v. Gow*, 77 Mich. 16. Had objection been seasonably made, it should have prevailed, unless defendant had asked leave to amend. But the record discloses that this point was not raised until the testimony was concluded, and then the plaintiff requested the court to instruct the jury "that, under the plea and notice filed in this case, the defendant cannot be allowed for any of the items of his claim." Under the record as it now appears, plaintiff saw fit to go to trial in both the justice's and circuit courts without any objection to the sufficiency of the plea and notice. We think a plaintiff should not be permitted to raise such an objection at the close of the trial.

2. Defendant, claiming damages for violation of contract on the part of the Architectural Iron & Wire Works, had two courses open to him. He could have waited until the iron works or its assignee sued him, and then have recouped his damages, or he could have brought an independent action for damages. He chose the latter. The tort became merged in the judgment, which became a new debt, unaffected by the claim upon which it was based. Judgments are contracts, and are subject to set-off in actions of assumpsit. 1 Freem. Judgm. § 217; 15 Am. & Eng. Enc. Law, 338, 339. The latter authority states the rule as follows:

"And the present rule undoubtedly is that no second suit can be maintained on the same cause of action, irrespective of the question whether the judgment in the first suit was of a higher or lower nature than the cause of action; the reason for the rule being that the judgment is a judicial determination of the rights of the parties, into which the plaintiff has voluntarily elected to transform his claim."

The authorities in support of this are cited in note 7.

The general rule, as above stated, is admitted, but it is urged that that there are exceptions to it, and that the present case forms one of the exceptions. In *Eastern Townships Bank v. Beebe*, 53 Vt. 177 (38 Am. Rep. 665), the opinion recognizes the rule, but appears to limit it to domestic judgments. The opinion says:

"It [the judgment] is not so merged unless it has become a debt of record, so that the record itself has become a cause of action. . . . The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action."

The same rule was announced by this court in *Bonesteel v. Todd*, 9 Mich. 371 (80 Am. Dec. 90). We are not dealing with a foreign judgment, and the rule of those cases does not apply.

In *Ferrall v. Bradford*, 2 Fla. 508 (50 Am. Dec. 293), suit was brought against three parties upon a joint bond. The Bradfords, by fraud, procured a judgment to be rendered against the other obligor alone. The court would have applied the maxim, "*transit in rem judicatam*," but for the fraud of defendants. In that case there was no judgment against the defendants, but only against their joint obligor. So, it was held in *Bonesteel v. Todd*, *supra*, that a judgment rendered against two joint debtors in the State of New York, one of whom was not served with process and did not appear, did not bind the party not appearing, and did not prevent the plaintiff from suing upon the original cause of action in this State. In *Clark v. Rowling*, 3 N. Y. 216 (53 Am. Dec. 290), the sole question was the effect of a discharge in bankruptcy upon a judgment rendered after the petition in bankruptcy was filed, the decree in bankruptcy being rendered after judgment was taken. The basis of the decree in *Clark v. Rowling* is found in *Wyman v. Mitchell*, 1 Cow. 316, where the same question arose. Of that case the court, in *Clark v. Rowling*, say:

"And the court held that, although the original undertaking of the defendant was so merged in the judgment that no suit could be maintained upon it, yet that it was proper to inquire into the time and circumstances of the contract upon which the first judgment was founded, for the purpose of taking the case out of the operation of the defendant's discharge."

All the cases there cited involve the effect of a discharge in bankruptcy.

In *Stevens v. Damon*, 29 Vt. 521, the sole question litigated was whether items omitted by mistake from an account sued upon in justice's court were merged in the judgment, upon the ground that a party cannot split up his cause of action. It is there said:

"Ordinarily, such a judgment will bar a subsequent suit on the account so omitted, as the plaintiff cannot divide his account and make it the subject of several actions."

A like case is *Kane v. Morehouse*, 46 Conn. 300.

In *Fox v. Althorp*, 40 Ohio St. 322, the sole question was the right of the plaintiff to maintain four suits for monthly instalments of overdue rent. Four suits had been begun before a justice of the peace for the instalments due on the 1st days of September, October, November, and December. Judgment was rendered in the suits involving the September and October instalments, and the justice then rendered judgment upon the same evidence in each of the other suits. Defendant paid the judgments for the instalments due in November and December, and appealed the other judgments to the common pleas, and there pleaded satisfaction of the judgments in bar. The court found that practically the four suits were tried as one, and the court based its

judgment upon the ground that the defence was purely technical, and that defendant acquiesced in the severance. In *Cramer v. Manufacturing Co.*, 35 C. C. A. 508, 93 Fed. 686, the sole question was whether a party was bound by a judgment rendered in a suit brought by him against another defendant, and whether such judgment was *res judicata* as to the latter suit. The decision was based upon the fact that the real party defending had not done so openly, to the knowledge of the opposite party, and therefore was not bound by the judgment.

In these cases it was not sought to reopen the judgments for the purpose of contesting the original causes of action, where judgments had been rendered against defendants who had been served with process, or who had appeared and contested the suits. Nor do they involve a case like the present, where the party, having a choice of two remedies, has chosen to bring his suit for damages. Defendant, Reich, had been garnished, and evidently disclosed in the garnishment suit his claim for damages, which was greater than the amount due upon the contract. Evidently, at his request, the garnishment suit was held to permit him to establish in a separate suit his claim for damages. I see no reason why he could not have made that defence in the garnishment suit, which would have wiped out the claim assigned to Bacon. I find no evidence of fraud or deception on the part of Bacon or his assignor in the assignment of this claim, or any evidence that it was assigned for the purpose of defeating Reich. The rule of law involved cannot, in my judgment, be changed by the fact that the iron works has become insolvent. The original cause of action in Reich against the iron works has, in the language of *Eastern Townships Bank v. Beebe*, 53 Vt. 177 (88 Am. Rep. 665), become so merged in the judgment "that the record itself has become a cause of action." The only office which that judgment can now serve is as a set-off. *Huntoon v. Russell*, 41 Mich. 816.

Judgment should be reversed and new trial ordered.

MONTGOMERY, J., concurred with GRANT, C. J.

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